THE

Federal Railway Digest

A Cumulative Quarterly

Digesting All Decisions

Both State and Federal

Pertaining to the Civil and
Criminal Liability of

Interstate Carriers by Rail

Under All Acts of Congress

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ADAMSON LAW*

Computation of Day's Work.

The thirty minutes required of trainmen preparatory to their trips is to be included in determining their day's work under the Adamson law. Nelson v. St. Joseph & Grand Island R. Co., — Mo. App. —, 205 S. W. 870.

Overtime.

The fact that a trainman's contract of employment does not provide for overtime pay, or specify what shall constitute a day's work, cannot alone defeat his right under the Adamson law to payment for overtime, since that law supplies such omission unless it is clearly inapplicable because the contact of employment cannot be construed so as to ascertain the daily wage. Nelson v. St. Joseph & Grand Island R. Co., — Mo. App. —, 205 S. W. 870.

The fact that a contract of employment provides for a fixed monthly wage does not preclude liability under the Adamson law for overtime work above the eight-hour period, where the daily wage may be easily ascertained. Nelson v. St. Joseph & Grand Island R. Co., — Mo. App. —, 205 S. W. 870.

A contract to pay a trainman a fixed monthly wage for two round trips every four days with the fifth day off, is such that his daily compensation can be easily ascertained so as to entitle him to recover under the Adamson law for overtime work. Nelson v. St. Joseph & Grand Island R. Co., — Mo. App. —, 205 S. W. 870.

*For text of Adamson Law see Vol. I, Federal Ry. Digest, Part 3, p. 167.

ANIMALS

See Carriers of Interstate Freight and Express, VII

BOILER INSPECTION ACT*

FEDERAL

For previous decisions see Federal Ry. Digest, Vol. I, No. 2, pp. 7-8, and Vol. II, p. 5.

I. VALIDITY AND CONSTRUCTION.

A. In General.

(No decisions.)

B. Effect of Act on State Laws.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 7.

(No new decisions.)

C. Duty Imposed on Carriers.

See generally same section Federal Ry. Digest, Vol. I, p. 7.

(No new decisions.)

II. LIABILITY FOR INJURIES TO EMPLOYEES.

A. In General.

For previous decisions see same section Federal Ry. Digest, Vol. I, p. 7.

In General.

A carrier is liable under the Federal Employers' Liability Act for the death of an engineer in consequence of the explosion of the boiler of an oil burning locomotive as the result of the alleged negligence of the former in using large button head bolts in the crown sheet, although such type of bolts had not been disapproved by the Federal boiler inspectors. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

A judgment for the plaintiff was sustained in an action based on the Federal Employers' Liability Act for the death of an engineer as the result of the explosion of the boiler of an oil burning locomotive which was equipped with an improper type of crown sheet stay bolts having large button heads, and for which the defendant failed to provide safety fusible plugs, and also permitted scale to accumulate on the crown sheet. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

The evidence in an action under the Federal Employers' Liability Act for the death of an engineer, by the explosion of an oil burning locomotive boiler, as the result of the alleged negligence of the defendant in using crown sheet bolts having large button heads exposing an unnecessarily large surface to the flames, held not to show that the government boiler inspectors had approved either large or small bolt heads in such locomotives. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

Clothing Catching on Bolt.

The Federal Boiler Inspection Act has no application to an action for injuries received by a switchman in consequence of his clothing catching on the jagged end of a bar or brace which extended slightly above the footboard of a switch engine. Miller v. Chicago, Burlington & Quincy R. Co., — Minn. —, 167 N. W. 117.

Assumed Risk.

The Federal Boiler Inspection Act is a statute enacted for the safety of employees, within the meaning of section 4 of the Federal Employers' Liability Act providing that servants shall not be deemed to assume the risks of their employment where the violation by a carrier of any statute enacted for the safety of employees contributes to the injury or death of a servant. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

B. Actions.

For previous decisions see same section Federal Ry. Digest, Vol. I, p. 8.

Orders of Director General of Railroads respecting venue of actions. See Government Operation of Railways.

*For text of act see Federal Ry. Digest, Vol. I, No. 2, p. 392.

Instructions.

An instruction in an action under the Federal Employers' Liability Act, to the effect that an employee did not assume the risk of injury from the use of a locomotive having a boiler which was not in the condition of safety required by the Federal Boiler Inspection Act, held more favorable to the defendant than the law required in an action for the death of an engineer from the explosion of the boiler. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

An instruction in an action under the Federal Employers' Liability Act to the effect that an employee was not guilty of contributory negligence in using a locomotive having a boiler which did not satisfy the Federal Boiler Inspection Act, was more favorable to the defendant than the law required. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

An instruction was properly refused when to the effect that if a railway company was negligent in the construction and maintenance of a locomotive boiler, an engineer assumed the risk of injury by continuing to use it with knowledge of its condition and the danger of using the same; but that he could not be charged with assuming such risk if the defendant violated some Federal statute; that the defendant was not liable for injuries caused by adopting an improper type of crown sheet bolts, or in failing to install fusible plugs in a locomotive boiler, even though the defendant's negligence caused the explosion of the boiler and the death of the engineer, if he was familiar with the type of construction, or the particular form of negligence involved, and knew the dangers likely to arise therefrom, or in the exercise of reasonable care he should have known of them previous to his injury. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

III. CRIMINAL LIABILITY.

(No decisions.)

CARRIAGE OF PERSONS

I. IN GENERAL.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 7-11 and No. 4, pp. 4-5.

Unjust Discriminations. —Making Unscheduled Stop.

The Act Regulating Commerce prohibits a carrier extending to a person any privilege or facility in the interstate transportation of passengers except such as are specified in the tariffs, such as contracting to stop a train at an unscheduled station. May v. Seaboard Air Line R. Co., — S. C. —, 96 S. E. 482.

Liability Under Carmack Amendment for Injury to Passenger.

The Carmack Amendment does not apply to the transportation or injury of persons, but deals exclusively with the shipment of property. Chicago, Rock Island & Pac. R. Co. v. Maucher, — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 108, affirming 100 Neb. 237, 159 N. W. 422.

An initial carrier which sells a ticket for interstate transportation over several connecting lines, including a bus transfer company, is liable under the Carmack Amendment for injuries sustained by a passenger through the negligence of the latter company. Gray v. Colorado & Southern R. Co., — Tex. Civ. App. —, 204 S. W. 347.

Where a carrier sells a ticket for interstate transportation over several connecting lines, the subsequent carriers are answerable under the Carmack Amendment only for their own negligence. Gray v. Colorado & Southern R. Co., — Tex. Civ. App. —, 204 S. W. 347.

II. FARES AND TICKETS.

See also same section Federal Ry. Digest, Vol. 1, No. 3, p. 7, and Vol. II, p. 5.

Establishing Excursion Rates. — Posting.

Under the rule of the Interstate Commerce Commission adopted October 12, 1915, amending Rule 52, it is not necessary that notice of the establishment of an excursion rate of fare be posted in two public and conspicuous places in the waiting rooms where tickets, for such excursion are sold, since it is sufficient if the tariff thereof is on file at stations. Mississippi Cent. R. Co. v. Graham, — Miss. —, 80 So. 66.

III. PASSES.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 8-9, No. 4, pp. 4-5, and Vol. II, p. 6.

A. In General.

Nature.

A pass issued for the free interstate transportation of the wife of a railway employee is a gratuity. Clark v. Southern R. Co., — Ind. App. —, 119 N. E. 539.

Stating Conditions of Pass in Schedules and Tariffs.

The Act Regulating Commerce does not require that the terms and conditions of a free pass issued to the wife of an employee for interstate transportation, or that any rule or regulation governing its issue, shall be made a part of the schedules of rates, fares and charges filed with the Interstate Commerce Commission. Clark v. Southern R. Co., — Ind. App. —, 119 N. E. 539.

B. Contracts to Issue.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 8, and Vol. II, p. 6.

(No new decisions.)

C. To Whom Issued.

See generally same section Federal Ry. Digest, Vol. I, No. 3, p. 9, No. 4, p. 8, and Vol. II, p. 7.

Wife of Employee.

The Act Regulating Commerce permits an interstate carrier to issue a free pass for the interstate transportation of the wife of an employee. Clark v. Southern R. Co., — Ind. App. —, 119 N. E. 539.

D. Limitation of Liability.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 9, and Vol. II, p. 8.

Effect of State Laws.

Neither the Act Regulating Commerce nor the Carmack Amendment preclude the application to a pass issued for the interstate transportation of the wife of a railway employee, of a state statutory or constitutional prohibition against contracts limiting the liability of carriers. Clark v. Southern R. Co., — Ind. App. —, 119 N. E. 539.

A state statute making void all limitations of a carrier's liability contained in tickets or passes unless printed in type of a designated size, applies to a free pass issued for the interstate transportation of the wife of an employee. Clark v. Southern R. Co., — Ind. App. —, 119 N. E. 539.

A condition of a free pass issued for the interstate transportation of the wife of a railway employee limiting the liability of the carrier, is void under a state constitutional and statutory prohibition against such contracts. Clark v. Southern R. Co., — Ind. App. —, 199 N. E. 539.

Caretakers of Live Stock.

— Limitation of Time for Action for Injury.

A condition of a live stock contract for the free interstate transportation of a caretaker without charge other than that paid for transporting the cattle, that no action for injuries accruing out of the contract of shipment shall be maintained unless brought within six months includes an action for personal injuries to the caretaker, and is valid. Achen v. Atchison, Topeka & Santa Fe R. Co., — Kan. —, 175 Pac. 980.

The fact that in a contract for the free interstate transportation of a caretaker of live stock without charge other than that paid for transporting the cattle, contains an unenforceable provision releasing the carrier from liability for its own negligence, does not destroy the entire contract, so as to invalidate a provision relating to the time within which an action for injury to the caretaker must be commenced. Achen v. Atchison, Topeka & Santa Fe R. Co., — Kan. —, 175 Pac. 980.

An action for injuries sustained by a caretaker while accompanying an interstate shipment of live stock without payment of fare other than the charges paid for transporting the cattle, is within a condition of the contract of shipment that no action for injuries accruing or arising out of the contract shall be maintained unless brought within six months. Achen v. Atchison, Topeka and Santa Fe R. Co., — Kan. —, 175 Pac. 980.

E. Improper Use of Passes.

See same section Federal Ry. Digest, Vol. I, No. 3, p. 10.

(No new decisions.)

IV. OBTAINING TRANSPORTATION IN VIOLATION OF LAW.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 10-11.

A. In General.

(No new decisions.)

B. Expulsion.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 10.

(No new decisions.)

C. Injury or Death.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 11.

(No new decisions.)

CARRIERS OF INTERSTATE FREIGHT AND EXPRESS*

I. In General.
- A. Validity of Federal Laws.
- B. Operation.
- C. What Carriers Within Federal Laws.
- D. What Shipments are Interstate.

II. What Laws Govern.
- A. In General.
- B. Federal Laws.
- C. State Laws.

III. Interstate Commerce Commission.
- A. In General.
- B. Powers and Duties.
- C. Orders and Findings.

IV. Rates and Charges.
- A. In General.
- B. Establishment.
- C. Reasonableness.
- D. Binding Effect of Established Rates.
- E. Construction of Schedules and Tariffs.
- F. Particular Charges and Rates.
  - 1. In General.
  - 2. Demurrage and Car Service Rates.
    - (a) In General.
    - (b) Reasonableness of Rules and Rates.
    - (c) Demurrage on Private Cars.
    - (e) Delays in Unloading Attributable to Carrier.
- G. Duty to Collect Established Rates.
- H. Contracts Respecting Rates and Charges.
- I. Recovery of Undercharges.
  - 3. When Less Than Tariff Rate Collected.
    - (a) In General.
    - (b) Mistakes in or Misquotations of Rates.
  - 5. Effect of Failure to File or Post Rates
  - 8. Estoppel.
  - 10. Who Liable.
- J. Recovery of Overcharges.
- K. Misquotation of Rates.
- L. Liens and Sales for Charges.
  - 2. Sales.
- M. Recovery of Shipment When Overcharge Demanded.
- N. Pooling.

V. Allowances, Discriminations, Preferences and Rebates.
- A. General.
- B. Contracts Creating.
- C. Allowances for Services in Connection with Shipment.
- D. Discriminations and Preferences.
  - 1. In General.
  - 8. In Transportation and Delivery.
- E. Rebates.
  - 1. In General.

VI. Contracts Pertaining to Shipments.
- A. In General.
- B. For Switch Tracks and Shipping Facilities.
- C. Transportation.
  - 5. Time for and Expediting Transportation.
- D. Contracts of Affreightment.
- E. Rates.
- F. Milling in Transit and Stopover Privileges.
- G. Exclusive Privileges.
- H. Contracts for Allowances, Rebates, Discriminations and Preferences.
- I. Contracts Relating to Carrier's Liability.
  - 2. Value of Shipment.
    - (a) In General.
    - (c) Knowledge of and Assent to Limitation.
    - (d) Who May Bind Shipper.
    - (l) At Particular Time and Place.
  - 6. Notice of Injury, Loss or Damage Claims.
    - (a) In General.
    - (b) Validity of Requirement For.
    - (d) Particular Periods.
    - (e) Effect of Noncompliance.
    - (g) What Losses Within Requirement for Notice.
    - (h) Form and Sufficiency.
    - (i) Service.
    - (j) Waiver.
  - 7. Time for Bringing Action.

VII. Carriers of Live Stock.
- A. In General.
  - 1. Validity and Construction of 28 Hour Act.
- C. Live Stock Quarantines.
- D. Injuries to Stock Awaiting Shipment.

*For text of Interstate Commerce Act see No. 3, Vol. I, Federal Ry. Digest, p. 167.

I. IN GENERAL.

A. Validity of Federal Laws.

See same section, Vol. I, No. 4, Federal Ry. Digest, p. 7.

Power of Congress.

Congress has the power to regulate all material phases of interstate commerce. State v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 206 S. W. 419.

The Federal constitution grants power to Congress to regulate commerce; and it may enact such laws and provide such regulations as national interest may demand. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

The Authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and a full control by Congress over the acts committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

B. Operation.

See in general same section Vol. I, Federal Ry. Digest, No. 4, p. 7.

(No new decisions.)

C. What Carriers Within Federal Laws.

See same section Vol. I, Federal Ry. Digest, No. 4, pp. 7-8.

(No new decisions.)

D. What Shipments are Interstate.

See also same section Vol. I, Federal Ry. Digest, No. 4, pp. 8-9, and Vol. II, pp. 17-18.
When interstate character of shipment jury question, see infra XIII, J.

In General.

The transportation of live stock from one state to another constitutes interstate commerce. State v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 206 S. W. 419.

A bill of lading is not conclusive of the interstate character of a shipment, but it may be considered with other incidents of the transactions as a circumstance throwing light on the question whether a shipment is interstate or intrastate. Service v. Sumter Valley R. Co., — Oreg. —, 171 Pac. 202.

Reconsigned Shipments.

A shipment is intrastate where a car of hay, billed from one state to another, is, at destination, reconsigned to a purchaser at another intrastate point. Panhandle & Santa Fe R. Co. v. Talmage, — Tex. Civ. App. —, 206 S. W. 862.

Intrastate Shipment Passing Through Adjoining State.

A shipment is interstate when goods in transit between two points within the same state pass partly through an adjoining state. Heineman v. Erie R. Co., — App. Div. —, 172 N. Y. Supp. 111.

II. WHAT LAWS GOVERN.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 16, and Vol. II, pp. 17-18.
Applicability of Carmack Amendment to interstate shipments, see infra, XI, F.
Application of Cummins Amendment, see infra XII.

A. In General.

(No new decisions.)

B. Federal Laws.

See also same section Vol. I, Federal Ry. Digest, No. 3, p. 16, and Vol. II, p. 17.

In General.

The regulations of interstate commerce provided by Congress are supreme. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

The relations between common carriers and shippers with respect to interstate shipments, are no longer mere matters of contract, but are fixed by the laws and rules regulating interstate commerce, which partake of the nature of statutory obligations. Chicago, Indianapolis & Louisville R. Co. v Peterson, —Wis. —, 169 N. W. 558.

The rights, liabilities and remedies of the parties to an interstate shipping contract are governed alone by the pertinent Federal Laws. Nashville, Chattanooga & St. Louis R. Co. v. Camper, — Ala. —, 78 So. 925.

The rights and liabilities of the parties to an interstate shipment depend upon Federal legislation, the contract or bill of lading, and the common-law rules as accepted and applied in the Federal courts. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 175 Pac. 539.

The rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the contract or bill of lading under which the shipment is made, and common-law rules as accepted and applied in Federal tribunals. St. Louis, Iron Mt. & Southern R. Co. v Bentley, — Okla. —, 176 Pac. 250.

The Federal statutes control the rights of the parties to an interstate shipment. Adams Express Co. v Burr Oak Jersey Farm, — Ky. —, 206 S. W. 173.

In State Courts.

A state court must determine the rights and liabilities of the parties to an interstate shipment in accordance with the rules announced by the Federal courts. Toledo & Ohio Cent. R. Co. v. Kibler & Bros Co., — Ohio, —, 119 N. E. 733, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 10.

Applicable Federal statutes are paramount in an action for injuries to an interstate shipment to the exclusion of inconsistent state rules of liabilitly and procedure. Florida East Coast R. Co. v. Davis, —, Fla. —, 79 So. 637.

The decisions of the Supreme Court of the United States construing and applying the Federal law to interstate shipments are controlling in actions in a state court. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 175 Pac. 539.

The decisions of the United States Supreme Court on questions pertaining to interstate commerce are binding on state courts to the exclusion of their own decisions. Hart v. Oregon Short Line R. Co., 207 Ill. App. 290.

The construction placed on the Interstate Commerce Act by the Supreme Court of the United States is binding on a state court. St. Louis, Iron Mt. & Southern R. Co. v. Wood, — Ark. —, 207 S. W. 32.

Since the Act Regulating Commerce is a Federal one state courts are bound by the construction placed thereon by the Supreme Court of the United States. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

In cases in state courts involving the rights and liabilities of the parties to an interstate railway shipment, the decisions of the Supreme Court of the United States, construing and applying the Federal Act, are controlling. St. Louis, Iron Mt. & Southern R. Co. v. Bentley, — Okla, —, 176 Pac. 250.

C. State Laws.

See also same section Vol. I, Federal Ry. Digest, No. 3, p. 16, and Vol. II, p. 18.

Effect of Carmack Amendment on state law, see infra, XI, D, 2.

In General.

Since Congress has occupied the whole field of Interstate commerce by the Interstate Commerce Act and the several amendments thereto, all state legislation on the same subject is superseded. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari deniel 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

A state law is void if it conflicts with regulations of interstate commerce prescribed by Congress, or covers the same subject. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

State Laws Relating to Particular Subjects.

A state statute prescribing a penalty for a carrier's delay in transporting freight does not apply to an interstate shipment. Bivens Bros. v. Atlantic Coast Line R. Co., — N. C. —, 97 S. E. 215.

A state law requiring common carriers to furnish on demand cars lined and coopered for shipment of grain, flour, or flour mill products, does not apply to cars furnished for interstate shipments. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

A state statute invalidating conditions in bills of lading denying liability of carriers for the failure of shippers to give notice of damage claims, does not apply to an interstate shipment. Nashville, Chattanooga & St. Louis R. Co. v. Camper, — Ala. —, 78 So. 925.

There cannot be a recovery of a penalty under a state law for the failure of a carrier to furnish cars for interstate use. Farmers' Grain & Mercantile Co. v. Union Pac. R. Co., — Kan. —, 175 Pac. 599.

III. INTERSTATE COMMERCE COMMISSION.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 16-23, and Vol. II, pp. 19, 20.

A. In General.

See also Federal Ry. Digest, Vol. II, p. 19.

Jurisdiction in General.

The Interstate Commerce Commission has exclusive jurisdiction to determine whether a regulation or practice affecting rates, or matters sought to be affected by the Act Regulating Commerce, is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial; and the courts may not, as an original question, hear complaints and pass upon any of the administrative questions which such act has

invested such body with power to determine. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

Character of Equipments.

The character of equipment which a carrier must provide, and the allowances which it must make for instrumentalities supplied, and services rendered by shippers, such as lining cars used in transporting carload shipments of grain in bulk, are problems which directly concern rate making, and are peculiarly administrative, on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

B. Powers and Duties.

(No decisions.)

C. Orders and Findings.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 16-23, and Vol. II, p. 19.

(No new decisions.)

IV. RATES AND CHARGES.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 23-41, No. 4, pp. 9-13, and Vol. II, pp. 20-26.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 9, and Vol. II, p. 20.

Who liable for undercharges, see infra IV, I, 10.

Who Liable for Freight Charges.

— Agent.

In order to relieve an agent-consignee from liability for the freight charges on an interstate shipment, it must affirmatively appear that the carrier had actual notice of the agency. Jackson v. Piowaty, 205 Ill. App. 329.

A carrier's knowledge that the consignee is engaged in the commission and brokerage business is not notice that he is agent for one making an interstate shipment to him. Jackson v. Piowaty, 205 Ill. App. 329.

— Consignor.

The consignor is primarily liable for the freight charges on an interstate shipment made under a bill of lading providing that the owner or the consignee shall pay the charges, even before delivery if required. Chicago, Indianapolis & Louisville R. Co. v. Peterson, — Wis. —, 169 N. W. 558.

The failure of a carrier to collect interstate freight charges from a consignee does not relieve the shipper from liability for the same, where the bill of lading requires the owner or consignee to pay the freight charges, even before delivery if required. Chicago, Indianapolis & Louisville R. Co. v. Peterson, — Wis. —, 169 N. W. 558.

A custom of a carrier to collect from consignees the interstate freight rates on potatoes does not relieve a consignor from liability therefor, where the bill of lading provides that the owner or consignee shall pay the freight, since to give effect to such custom would create an unlawful preference to that particular class of shippers. Chicago, Indianapolis & Louisville R. Co. v. Peterson, — Wis. —, 169 N. W. 558.

— Consignee.

The provisions of the Act Regulating Commerce that "the owner or consignee shall pay the freight and all other lawful charges" is constitutional. Jackson v. Piowaty, 205 Ill. App. 329.

A consignee receiving an interstate shipment is impliedly liable for the charges. Jackson v. Piowaty, 205 Ill. App. 329.

— When Carrier Abandons Transportation.

A carrier who abandons the interstate transportation of live stock because of a Federal quarantine, and returns the cattle to the shipper at the place of consignment, cannot collect freight charges for such transportation. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

B. Establishment.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 23-25, and No. 4, pp. 9-10.

Publication.

To be effective an interstate freight tariff which is filed with the Interstate Commerce Commission, need not also be printed and published by the carrier. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

Presumption of Publication.

In a suit by carrier to recover from a consignee the unpaid balance of interstate freight charges, it being admitted that a schedule of rates had been duly filed with and approved by the Interstate Commerce Commission, the presumption is, in the absence of any showing to the contrary, that the rates were duly pub-

lished, and not that the carrier violated the Elkins Act by failing to publish the rates. Atchison, Topeka & Santa Fe R. Co. v. Wagner, — Kan., —, 172 Pac. 519.

C. Reasonableness.

See same section Federal Ry. Digest, Vol. I, No. 4, p. 10.

Not Question for Courts.

The reasonableness of a regularly established interstate freight charge is not a question for the courts. Baltimore & Ohio R. Co. v. Carnegie Steel Co., 251 Fed. 682.

D. Binding Effect of Established Rates.

See same section Federal Ry. Digest, Vol. I, No. 3, p. 25, No. 4, p. 10, and Vol. II, p. 21.

In General.

A freight rate duly fixed and filed with the Interstate Commerce Commission is binding alike on carrier and shipper. New York Central R. Co. v. Peak, 6 Ohio App. Rep. 399.

A schedule of freight rates duly filed and published by a railroad company and not disapproved by the Interstate Commerce Commission, has the force of a statute, binding alike on shipper and carrier. Atchison, Topeka & Santa Fe R. Co. v. Young, — Kan. —, 171 Pac. 1156.

The fact that tariff rates fixed by the Interstate Commerce Commission are on file with it gives implied notice to all persons interested in such rates. Jackson v. Piowaty, 205 Ill. App. 329.

An interstate shipper cannot disclaim knowledge or notice of the Act Regulating Commerce, or freight schedules and tariffs filed under it. Dickerson v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 5.

Interstate freight rates which are published according to the requirements of the Act Regulating Commerce, are absolutely binding upon all persons to a contract of interstate affreightment, such rates having the force of a statute, and they cannot be varied on any pretext nor lawfully departed from. New York Central & H. R. R. Co. v. York, — Mass. —, 119 N. E. 855.

Since the passage of the act regulating commerce both a shipper and a carrier are bound by the schedule of rates filed with the Interstate Commerce Commission; and to charge any less rate, whether by mistake or otherwise, gives an unlawful preference. Blackford v. St. Louis, Iron Mt. & So. R. Co., — Ky. —, 203 S. W. 867.

A shipper is conclusively presumed to have knowledge of the freight rate for an interstate shipment as fixed by the schedules filed with the Interstate Commerce Commission. Blackford v. St. Louis, Iron Mt. & So. R. Co., — Ky. —, 203 S. W. 867.

Under the Act Regulating Commerce the freight rate for an interstate shipment is not that named in the bill of lading, but is the rate duly established according to law, irrespective of the knowledge of the consignee and regardless of whether he was misled by the carrier as to the lawful rate. Western Ry. of Alabama v. Collins, — Ala. —, 78 So. 833.

The published interstate freight rates of a carrier are presumed to be equally within the knowledge of carrier and shipper, both of whom are, as a matter of law, bound by such rates. Bassett v. Chicago & Northwestern R. Co., — Wis. —, 169 N. W. 553.

E. Construction of Schedules and Tariffs.

See same section Federal Ry. Digest, Vol. I, No. 4, p. 10.

In General.

In an action to recover undercharges on interstate shipments, computed according to the schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles, since the Interstate Commerce Commission only can modify the schedule. Atchison, Topeka & Santa Fe R. Co. v. Young, — Kan. —, 171 Pac. 1156.

Carload Shipments.

When freight belonging to two persons was billed to one consignee only as a carload lot, the delivering carrier cannot collect from each owner, under rule 6 of the Western Classification, the minimum carload rate, since ownership cannot be made the test by which the charges are to be measured. St. Louis & San Francisco R. Co. v. First Nat. Bank of Elk City, — Okla. —, 171 Pac. 467.

F. Particular Charges and Rates.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 25-28, No. 4, pp. 10-12, and Vol. II, p. 21.

1. In General.

See generally same section Federal Ry. Digest, vol. II, p. 21.

Charges for Moving Slag for "Wastage."

The fact that a carrier used for its own purposes slag and ashes removed in carload lots from an industrial plant is no defense to an action against the latter for the established charges for moving such

materials for wasting. Baltimore & Ohio R. Co. v. Carnegie Steel Co., 251 Fed. 682.

2. Demurrage or Car Service Rates.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 25-27, No. 4, p. 11, and Vol. II, p. 22.

Excessiveness of penalty for failure to collect demurrage, see infra XIV, J.

Power of state court to construe demurrage tariff, see infra XIII, B, 4 (d).

(a) In General.

See also same section Federal Ry. Digest, vol. II, p. 22.

Penalties For Failure to Collect Demurrage.

A carrier is liable to a penalty for failing to collect demurrage charges on an interstate shipment, although it believed that under its tariff the shipment was free from such charges because unloading was delayed in consequence of the carrier placing cars in inverse order of their delivery for shipment. Michigan Central R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

A carrier's failure to collect demurrage charges is not in good faith, so as to relieve it from liability for the prescribed penalty, when due to a misapprehension that an interstate shipment was not within a cartage tariff, where the carrier ignored the plain provision of such tariff that the established charges should be collected unless the failure to make delivery was that of the carrier. Michigan Central R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

(b) Reasonableness of Rules and Rates.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 26.

Who May Determine.

The Interstate Commerce Commission only, and not a court in which an action for demurrage on interstate shipments is brought, can grant a shipper relief under a provision of the carrier's tariff that "allowances will be made for railroad errors which prevent proper tender or delivery." Cleveland & Western Coal Co. v. Pennsylvania Co., — Ohio, —, 119 N. E. 367.

(c) Demurrage on Private Cars.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 26, No. 4, p. 11, and Vol. II, p. 23.

In General.

A carrier may recover demurrage on privately owned tank cars containing interstate shipments, while the cars are standing on that portion of a side track owned by a consignee but built under a contract with the carrier, whereby it was entitled to use such track without cost for business other than that of the consignee when not in use by him. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Freedom Oil Works, 247 Fed. 573.

A carrier may, in addition to the regular demurrage charges, collect storage charges on interstate shipments of gasoline in private tank cars while standing on that portion of a side track owned by the consignee and built by the carrier under a contract permitting it to use the track for business other than that of the consignee when not occupied by him. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Freedom Oil Works, 247 Fed. 573.

(e) Delays in Unloading Attributable to Carrier

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 27, and Vol. II, p. 23.

In General.

An action for demurrage on interstate shipments cannot be defeated by showing that the charges should be suspended because of wrongful delays on the part of the carrier, notwithstanding that the demurrage tariff provides that "allowances will be made for railroad errors which prevent proper tender or delivery," since the Interstate Commerce Commission alone can grant relief for such delays. Cleveland & Western Coal Co. v. Pennsylvania Co., — Ohio, —, 119 N. E. 367.

Effect on Liability of Consignee.

It is only when the failure to make delivery is due to negligence of the carrier that a consignee is relieved from liability for demurrage charges on an interstate shipment which the carrier agreed to deliver under a cartage tariff providing that shipments should not be subject to car service or storage charge accruing through the failure of the carrier to make delivery within the free time. Michigan Central R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Delivering Excessive Number of Cars.

A provision of an interstate demurrage tariff as to added free time when the delivery of cars is "bunched" as the result of the act or negligence of the carrier, does not relieve a consignee from liability for such charges when the "bunching" was due to his failure to accept freight be-

cause of delivery by the carrier in inverse order to the delivery of the cars for transportation. Michigan Central R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

The fact that cars are not unloaded within the free time because a carrier did not place them in the order of their shipment, does not relieve the consignee from liability for demurrage charges, although the tariff provides that such charges should not be made for detention of cars through errors or omissions of the carrier. Michigan Central R. R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

G. Duty to Collect Established Rates.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 28, and Vol. II, p. 24.

Collection of undercharges in general, see infra, IV, I.

In General.

A carrier must collect its duly established rates for transporting freight from one state to another. Portland Cattle Loan Co. v. Oregon Short Line R. Co., — C. C. A. —, 251 Fed. 33.

It is the duty of carriers to collect undercharges in interstate freight rates. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

H. Contracts Respecting Rates and Charges.

See generally infra VI.

I. Recovery of Undercharges.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 28-33, No. 4, p. 12, and Vol. II, p. 24.

3. When Less Than Tariff Rate Collected.

(a) In general.

See also same section Federal Ry. Digest, vol. I, No. 3, p. 29, No. 4, p. 12.

Recovery in General.

A carrier which accepts a less payment for an interstate shipment than that fixed by the duly established tariff may recover the difference. Sheldon v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 169 N. W. 189.

A carrier may recover undercharges on interstate shipments, since it cannot deviate from its established rates, but must exhaust all legal remedies to enforce the same. Southern R. Co. v. Latham, — N. C. —, 97 S. E. 234.

Since the Interstate Commerce law was enacted primarily for the protection of shippers and to prevent discriminations, unless carriers are required to collect undercharges in interstate freight rates, even when inadvertently made, a way is left open to defect the very purpose of the law and to permit the discrimination which it forbids. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

(b) Mistakes in or Misquotation of Rates.

See same section Federal Ry. Digest, Vol. I, No. 3, pp. 29-30.

Mistakes.

A carrier may recover an undercharge made on an interstate shipment in consequence of a mistake of an agent in ascertaining the rate. New York Central R. Co. v. Peak, 6 Ohio App. Rep. 399.

5. Effect of Failure to File, Publish or Post Rates.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 30.

In General.

A carrier may recover an undercharge in an interstate freight rate although the tariff has not been filed or posted as required by the Act Regulating Commerce. St. Louis, Iron Mt. & Southern R .Co. v. Wood, — Ark. —, 207 S. W. 32.

In order to recover undercharges on an interstate shipment a carrier need not prove that the freight tariff in question, if filed with the Interstate Commerce Commission, was also printed and kept open for public inspection. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

Set Off.
— Damages for Failure to File Tariff.

Where a shipper is charged an interstate freight rate according to an old tariff, he cannot, in an action by the carrier for the undercharge, recover damages for the latter's failure to file the new tariff with the agent making the rate, and neglecting to post the same as required by law. St. Louis, Iron Mt. & Southern R. Co. v. Wood, — Ark. —, 207 S. W. 32.

8. Estoppel.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 31.

In General.

A carrier cannot estop itself from demanding and collecting lawfully established

interstate freight rates. Western Ry. of Alabama v. Collins, — Ala. —, 78 So. 833.

The defense of estoppel is not available in a carrier's action to recover from a consignee the balance of an interstate freight charge which was erroneously understated in the bill of lading and settled on that basis, since the consignee is conclusively presumed to have knowledge of the correct published rate. Chicago, Milwaukee & St. Paul R. Co. v. Greenberg, — Minn. —, 166 N. W. 1073.

10. Who Liable.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 32.

Who liable generally for payment of charges, see supra IV, A.

Consignor.

Where a carrier delivered an "order notify" shipment to the holder of the bill of lading on payment by him of less than the established interstate freight rate, the consignor is not thereafter answerable for the deficiency. Western Ry. of Alabama vs. Collins.—Ala.—,78 So. 833.

A consignor under an "order notify" bill of lading which is indorsed "freight prepaid," is liable to a carrier for undercharges on an interstate shipment. Southern R. Co. v. Latham, — N. C. —, 97 S. E. 234.

Consignee.

The effect of the Elkins Act is to make the consignee of an interstate shipment the owner for all purposes, and liable to the same extent as the consignor. Atchison, Topeka & Santa Fe R. Co. Wagner, — Kan. —, 172 Pac. 519.

When an interstate bill of lading contains any provision authorizing the consignee to pay the freight, an implied contract to do so arises from his acceptance of the delivery of the goods under the bill into which must be read the provisions of the Elkins Act requiring payment of the full charges in compliance with the duly established rate. Atchison, Topeka & Santa Fe R. Co. v. Wagner, — Kan. —, 172 Pac. 519.

If the consignee, the presumed owner, accepts an interstate shipment and pays part of the freight, the law implies an agreement on his part to pay the balance to the carrier, where the latter, at the time of delivery of the shipment, has no knowledge of an arrangement between the consignor and consignee as to the payment of such charges, and the consignor then is and ever since has been insolvent. Chicago, Milwaukee & St. Paul R. Co. v. Greenberg, — Minn. —, 166 N. W. 1073.

"Order Notify" Consignee.

Under the terms of the Elkins Act an "order consignee" who accepts delivery of an interstate shipment and pays the charges demanded by the carrier, which are less than the established rate, is liable to the carrier for the unpaid balance of the legal charge. Atchison, Topeka & Santa Fe R. Co. v. Wagner, — Kan. —, 172 Pac. 519.

Commission Merchant.

Where a commission merchant obtained from the freight traffic manager of a carrier a written statement as to the correct freight rate for an interstate shipment, after which the former accepted the shipment and paid a lower rate, the inference is warranted that the acceptance of the goods constituted an agreement by the consignee to pay the lawful charges. New York Central & H. R. R. Co. v. York, — Mass. —, 119 N. E. 855.

Where fruit was shipped from a distant state over the lines of several carriers, and at destination the consignee informed the delivering carrier that the shipment was made on consignment, and that it would not be accepted unless the carrier stated the terms upon which it would release the fruit, the consignee is not liable to such carrier for an undercharge after selling the fruit, paying all expenses and remitting the proceeds to the consignor. New York Central & H. R. R. Co. v. York, — Mass. —, 119 N. E. 855.

A commission merchant was held liable for the charges of a carrier for disinfecting cattle cars used in interstate commerce, even though he had paid all other charges demanded by the carrier, sold the cattle and remitted the proceeds to the owner. Louisville & Nashville R. Co. v. Rice, 246 U. S.—, 62 L. ed. —. 38 Sup. Ct. Rep. 429.

J. Recovery of Overcharges.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 33-39, No. 4, p. 12, and Vol. II, p. 25.

In General.

Where a shipper pays an interstate freight rate which is afterwards declared excessive by the Interstate Commerce Commission, he may, without proof of any actual injury, recover from the carrier the difference between the rate paid and the reasonable rate. Atchison, Topeka & Santa Fe R. Co. v. Speller, — C. C. A. —, 249 Fed. 677, modifying 158 C. C. A. 277, 246 Fed. 1.

The sole remedy of one who pays an excessive or unlawful interstate freight rate which is prescribed by the duly established tariffs, is by direct appeal to the Interstate Commerce Commission. Sheldon v. Chi-

cago, Burlington & Quincy R. Co., — Iowa —, 169 N. W. 189.

When Due to Misrouting.

Where a carrier diverts an interstate shipment from the route designated by the shipper and consequently the consignee is compelled to pay a greater freight rate, he may recover the difference, but not from the carrier over whose road the deviation was made. Oden-Elliott Lumber Co. v. Louisville & Nashville R. C., — Ala. —, 79 So. 139, S. C. 77 So. 240, 78 So. 989.

K. Misquotation of Rates.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 39-40, and Vol. II, p. 26.

See supra IV, J. 3 (b).

L. Liens and Sales for Charges.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 40-41, and Vol. II, p. 26.

2. Sales.

In General.

In the absence of Federal legislation on the subject a carrier may sell an interstate shipment for charges in the manner prescribed by a state law. Norfolk & Southern R. Co. v. New Bern Iron Wks. & S. Co., 172 N. C. 188, 90 S. E. 149.

M. Recovery of Shipment When Overcharges Demanded.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 41.

(No new decisions.)

N. Pooling.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 41.

(No new decisions.)

V. ALLOWANCES, DISCRIMINATIONS, PREFERENCES AND REBATES.

See generally same sections Federal Ry. Digest, Vol. I, No. 3, pp. 41-49, No. 4, pp. 13-16, and Vol. II, p. 26.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 41-42, No. 4, p. 13, and Vol. II, p. 26.

(No new decisions.)

B. Contracts Creating.

See generally infra VI, contracts pertaining to Interstate Traffic.

C. Allowance for Services in Connection With Shipments.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 42-43, and No. 4, p. 13.

"Coopering" Grain Cars.

A shipper cannot recover from a carrier for sums expended by him in lining and coopering cars used for interstate bulk grain shipments, where the applicable tariff makes no provisions for such an allowance. Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

D. Discriminations and Preferences.

See generally same section Federal Ry. Digest. Vol. I, No. 3, pp. 43-48, No. 4, p. 13, and Vol. II, p. 27.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 43, and No. 4, p. 13.

Delivery of "Order Notify" Shipments Without Production of Bill of Lading.

No unlawful preference or discrimination with respect to interstate shipments is created by a contract of indemnity between a railway company and a mercantile house whereby all "order notify" shipments are to be delivered to the latter without the production of original bills of lading, where nothing appears from which it may be inferred that such contract is not in accordance with the established tariffs of the carrier, or that such privilege is not extended to all other shippers. Draper v. Georgia, Florida & Alabama R. Co., — Ga. App. —, 95 S. E. 16.

A condition of a bond to save a carrier from loss for the value of "order notify" shipments delivered without the production of the original bills of lading, or for "whatever amount it may be necessary for said railway company to pay to the consignees of such 'order notify'" shipments, either directly or through connecting lines, and due to the failure of the obligor to deliver such bills of lading, covers and includes the amount of a recovery by a consignee against the carrier for the value of a carload of flour that was delivered without the production of the original bill of lading, but which the obligor refused and turned back to the carrier because of its damaged condition, and which the latter sold as perishable freight. Draper v.

Georgia, Florida & Alabama R. Co., — Ga. App. —, 95 S. E. 16.

8. In Transportation and Delivery.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 47.

Contracts to expedite transportation, see infra, VI, C, 5.

Agreement to Move Shipment by Particular Train.

Where a train departed without taking an interstate shipment of live stock which was ready for transportation, and the station agent, after telegraphing about the matter, informed the shipper that a later train would move the stock, which it failed to do, there was no undue preference in violation of the Elkins Act in agreeing to make transportation by any particular train, and the shipper may recover resulting damages for the delay. Chicago, Rock Island & Pac. R. Co. v. Stallings, — Ark. —, 201 S. W. 294.

Contract to Expedite Shipment.

There is an unjust discrimination in violation of the Act Regulating Commerce where a carrier agrees to expedite the transportation of an interstate shipment without having an established rate for such service which is open to all shippers, and which is higher than that exacted for ordinary shipments. Grossman Mfg. Co. v. New York Central R. Co., — App. Div. —, 169 N. Y. Supp. 213.

E. Rebates.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 48-49, No. 4, pp. 14-16, and Vol. II, p. 27.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 48, No. 4, p. 14, and Vol. II, p. 27.

Failure to Collect Royalties.

An interstate railway company which transports in interstate commerce coal mined from property leased by it to an independent corporation, gives rebates in violation of the Elkins Act as amended, where the carrier fails to collect the stipulated royalties from the lessee. Northern Central R. Co. v. United States, 154 C. C. A. 25, 241 Fed. 25, certiorari denied 245 U. S. 645, 62 L. ed. —, 38 Sup. Ct. Rep. 9.

VI. CONTRACTS PERTAINING TO SHIPMENTS.

See generally same section Federal Ry. Digest, No. 3, pp. 50-75, No. 4, pp. 16-17, and Vol. II, pp. 27-40.

A. In General.

See also same section Federal Ry. Digest, No. 3, p. 50, and No. 4, p. 16.

What Laws Control Construction.

The construction of an interstate shipping contract is a Federal question upon which the pronouncements of the Supreme Court of the United States control. Midland Linseed Co. v. American Liquid Fireproofing Co., — Iowa, —, 166 N. W. 573.

Waiver of Conditions of Bills of Lading.

Conditions of an interstate bill of lading cannot be waived by the parties thereto. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

Special Privileges.

Neither carrier nor shipper can contract for an interstate shipment on terms different from those open to the general public, or which imposes any additional advantage to the shipper, or more extended duties on the part of the carrier. Adams Express Co. v. Burr Oak Jersey Farm, — Ky. —, 206 S. W. 173.

B. For Switch Tracks and Shipping Facilities.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 50.

(No new decisions.)

C. Transportation.

See generally same section Federal Ry. Digest, No. 3, p. 50, No. 4, p. 16, and Vol. II, p. 28.

5. Time For and Expediting Transportation.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 51.

For Through Transportation.

A carrier cannot contract for the through and direct transportation of an interstate shipment so as to render it liable for a delay caused by a necessary wait for the first local train which could complete transportation to a point at which the through train did not stop. Adams Express Co. v. Burr Oak Jersey Farm, — Ky. —, 206 S. W. 173.

To Expedite Transportation.

A carrier's contract with a shipper to expedite the transportation of an interstate shipment is void when not based on a duly established higher freight rate than that exacted for ordinary shipments, and which

is open to all shippers. Grossman Mfg. Co. v. New York Central R. Co., — App. Div. —, 169 N. Y. Supp. 213.

Breach of Contract to Expedite Transportation.

A carrier held liable for the breach of an oral contract to transport a shipment from a foreign country to the United States within a specified time, where the illegality of the agreement was not put in issue by the pleadings. John Vittucci Co. v. Canadian Pac. R. Co., — Wash. —, 174 Pac. 981.

The defendant cannot show in an action against a carrier for its breach of an oral agreement to transport a shipment from a foreign country within a specified time, that its tariffs did not permit contracts for expediting transportation, when the illegality of the agreement is not set up by the pleadings as an affirmative defense. John Vittucci Co. v. Canadian Pac. Co., — Wash. —, 174 Pac. 981.

D. Contracts of Affreightment.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 52, and Vol. II, p. 28.

Binding Effect of Bills of Lading.

When a carrier orally contracts with a person in this country for the transportation of a shipment from a foreign country within a specified time, the latter is not bound by contrary terms of a bill of lading issued without his knowledge at the place of shipment. John Vittucci Co. v. Canadian Pac. R. Co., — Wash. —, 174 Pac. 981.

Issuing Bill of Lading Without Receipt of Goods.

The Act of Congress of August 29, 1916, ch. 415, 39 St. 538, Comp, Stat. 1916, sections 8604aaa-8604w, relating to bills of lading in interstate and foreign commerce, does not apply to a bill of lading issued by a carrier without receipt of the goods as represented in the bill, so as to validate the bill in the hands of and make the carrier liable to an innocent purchaser for value. Commercial Nat. Bank v. Seaboard Air Line Ry., — N. C. —, 95 S. E. 777.

E. Rates.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 52-53, No. 4, p. 17, and Vol. II, p. 28.

Contracts for Less Than Established Rates.

A carrier's agreement to give a shipper a lower interstate freight rate than that fixed by the duly established tariffs is void. Sheldon v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 169 N. W. 189.

F. Milling in Transit and Stopover Privileges.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 54, and Vol. II, p. 28.

Unloading in Transit.

A carrier's agreement to stop an interstate carload shipment short of destination at two points to permit a partial unloading, is void where the tariff does not provide for such service, and the established rate to the first stopping place is the same as that to ultimate destination, so, but for the contract, the shipper would pay a greater rate for such transportation. Sheldon v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 169 N. W. 189.

G. Exclusive Privileges.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 54.

(No new decisions.)

H. Contracts for Allowances, Rebates, Discriminations and Preferences.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 55-57, No. 4, p. 17, and Vol. II, p. 29.

(No new decisions.)

I. Contracts Relating to Carrier's Liability.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 57-64.

Effect of Carmack Amendment on contracts limiting carrier's liability, see infra XI, I.

Validity of under Cummins Amendment, see infra XII.

2. Value of Shipment.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 58-64, and Vol. II, p. 29.

Validity under Cummins Amendment of limited liability contract, see infra XII.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 58, and Vol. II, p. 29.

As Limitation of Recovery.

Where rugs were shipped in boxes and bales under a declaration that each rug did not exceed a specified value, the shipper thereby obtaining a reduced interstate freight rate, he cannot recover in excess of the declared value for a loss of

the rugs. Haddad v. Southern Pac. R. Co., — App. Div. —, 173 N. Y. Supp. 256.

Where, in order to obtain a reduced interstate freight rate, a shipper declared the value of rugs, enclosed in boxes and bales, not to exceed $100 and $50 each, when in fact some were worth more and others less, in the event of loss the shipper cannot recover the declared value for each rug, but only the invoice price. Haddad v. Southern Pac. R. Co., — App. Div. —, 173 N. Y. Supp. 256.

Binding Effect of Conditions in Schedules and Tariffs.

One who accepts a contract for the interstate shipment of live stock under a reduced freight rate is bound by conditions of the tariff filed with and approved by the Interstate Commerce Commission, limiting the liability of the carrier for injury or loss. Tuller v. Chicago, Rock Island & Pacific R. Co., — Iowa —, 168 N. W. 301.

Contracts Limiting Liability of Carrier. — Consideration.

An interstate shipping contract limiting the liability of a carrier must be supported by a valuable consideration apart from the mere acceptance of the property for shipment. Illinois Cent. R. Co. v. Mattingly, — Ind. App. —, 119 N. E. 498.

— Necessity for Two Rates.

In order that an interstate shipping contract limiting the liability of the carrier may be binding the shipper must be given the opportunity of shipping under a higher rate with the unrestricted common-law liability of the carrier. Illinois Cent. R. Co. v. Mattingly, — Ind. App. —, 119 N. E. 498.

A mere recital in an interstate contract of affreightment of a difference in rates with a corresponding difference in the liability of the carrier, does not preclude the shipper from showing that he was not afforded an opportunity of making a choice of rates and of shipping with the unrestricted common-law liability of the carrier. Illinois Cent. R. Co. v. Mattingly, — Ind. App. —, 119 N. E. 498.

— Waiver.

A limitation of liability to $15 in an express receipt is waived by a carrier by instructing a consignee to purchase a new article in place of one lost by the former and for which it promises to pay although the cost exceeds $15. Wells Fargo & Co. v. Townsend, — Ark. —, 204 S. W. 417.

When Goods Caried at Reduced Rate to Fairs.

When a carrier transports an interstate shipment of live stock to a fair at full tariff rates the shipper is not bound by a limitation in the bill of lading for the return transportation when carried free of charge under section 9 of the Act Regulating Commerce, relating to transportation free or at reduced rates of property to fairs and expositions for exhibit. De Bow v. Vicksburg, S. & P. R. Co., — Ga. App. —, 95 S. E. 261.

Where, pursuant to section 9 of the Act Regulating Commerce which permits the carriage free or at reduced rates of property intended for exhibition at fairs or expositions, a carrier issued a general order that articles intended for such purposes would be transported to fairs or expositions at the full tariff rates and returned free of charge within thirty days, an exhibitor is not bound by a condition of a bill of lading issued for such return transportation free of charge which limits the liability of the carriers, and for losses caused by their negligence the shipper may recover full damages. De Bow v. Vicksburg, S. & P. R. Co., — Ga. App. —, 95 S. E. 261.

(c) Knowledge of and Assent to Limitation.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 60, and Vol. II, p. 30.

In General.

Where there is a rate made, carriage under it, and payment thereof, the rate being such as under the schedules demands a certain valuation and a contract with terms appropriate to that rate, the shipper may not, by a plea of ignorance of the law, schedules, contract, and bill of lading, recover a value that is assured by a higher rate. Dickerson v. Erie R. Co., — App. Div. —, 169 N. Y. Sup. 5.

When a carrier transports an interstate shipment free of charge under the provisions of section 9 of the Act Regulating Commerce relative to the transportation of property free or at reduced rates to fairs and exhibitions for exhibition purposes, no presumption arises of the knowledge of the shipper of the basing of the rate on value. De Bow v. Vicksburg, S. & P. R. Co., — Ga. App. —, 95 S. E. 261.

Who Bound By.

— Person Unable to Speak or Read English.

A person who can neither read, write nor speak the English language is not bound by a condition in an express receipt limiting a carrier's liability for an interstate shipment. Berlinsky v. Barrett, — Appt. Term —, 173 N. Y. Supp. 449.

(d) Who May Bind Shipper.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 60.

Denying Authority of Agent.

An interstate shipper cannot deny the authority of the person who made a contract of shipment under the duly established tariffs and schedules, so as to render the terms of a uniform live stock contract ineffectual. Dickerson v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 5.

5. Value at Particular Time and Place.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 62, and Vol. II, p. 31.

In General.

The words "place of shipment" in a bill of lading providing that the amount of loss or damages for which any carrier shall be liable shall be computed on the basis of the value of the property at the place and time of shipment, mean the city, town, or locality where the shipment originates as contradistinguished from the place of destination, and such words cannot be construed to mean the actual street or station from which the goods are shipped. Blessing v. Central R. of N. J., — N. J. —, 103 Atl. 1045.

A charge for carting a bag of potatoes from the place where the plaintiff bought them to the defendant's freight station at the same place, from whence they were shipped, does not constitute part of the value of the shipment within the meaning of a provision of an interstate bill of lading that "the amount of any loss or damage for which any carrier shall be liable, shall be computed on the basis of the value of the property at the time and place of shipment." Blessing v. Central R. of N. J., — N. J. —, 103 Atl. 1045.

6. Notice of Injury, Loss or Damage Claims.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 65-73, and Vol. II, p. 32.

Effect of Carmack Amendment on requirement for notice, see infra XI, J.

Validity under Cummins Amendment of requirement for notice, see infra XII.

When Cummins Amendment dispenses with notice, see infra XII.

(a) In General.

Purpose of Requiring Notice.

The object of the requirement of a bill of lading for giving a carrier written notice of loss, damage or injury to an interstate shipment, is to secure to the carrier reasonable notice of the injury. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

Construction.

Whether a condition of an interstate contract of affreightment relative to the filing of damage claims, has been complied with, is controlled by the Federal law. Emery & Co. v. Wabash R. Co., — Iowa, —, 166 N. W. 600.

A requirement of an interstate bill of lading for giving a carrier notice of loss or damage should be given a practical construction. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

Orders of Commission Dispensing with Notice.

The Interstate Commerce Commission did not, by conference rulings 456 and 510 relating to the adjustment of damage claims irrespective of the service of notice thereof, attempt to affect the terms of interstate contracts of affreightment, or order carriers to accept substitution in lieu of the contractual notice, but merely permitted carriers to do so if they chose. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

Burden of Showing Notice.

When the giving of written notice of damages to an interstate shipment is made a condition precedent to a carrier's liability for injury to an interstate shipment, the burden is on the shipper to show that such notice was given within the stipulated time, when made an issue in the case. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 175 Pac. 539.

(b) Validity of Requirement For.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 65, and Vol. II, p. 32.

Validity under Carmack Amendment of requirement for notice, see infra XI, J, 1 and 2.

In General.

Stipulations in an interstate bill of lading requiring written notice of claims for damages to be given carriers, and extinguishing their liability for failure to do so, are valid and effective. Nashville, Chattanooga & St. Louis R. Co. v. Camper, — Ala.,—, 78 So. 925.

(d) Particular Periods.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 66, and Vol. II, p. 32.

Particular periods for giving notice as affected by Carmack Amendment, see infra XI, J, 2 (b).

Under Cummins Amendment, see infra XII.

Before Removal of Stock and Mingling with Other Animals.

A requirement of an interstate shipping contract that a shipper, as a condition precedent to a carrier's liability for loss or injury to live stock, shall give the carrier written notice of his claim before the stock is removed from destination or place of delivery and mingled with other animals, is reasonable and valid. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S. W. 638.

The time for giving notice of the death of cattle dying during interstate transportation, under a bill of lading requiring ten days' written notice after the unloading of the stock, begins to run from the day the cattle were removed en route and a portion of them sold, rather than from the time the survivors were delivered at ultimate destination. Olson v. Chicago, Burlington & Quincy R. Co., — C. C. A. —, 250 Fed. 372.

Written notice of a damage claim for injury to an interstate shipment of live stock given to a carrier after the removal of the stock to a farm two miles distant from the town of destination, is not a sufficient compliance with a requirement of the bill of lading for giving such notice before the stock is removed from destination or place of delivery and mingled with other animals. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S. W. 638.

Service on an initial carrier of a claim for injury to an interstate shipment within three days after the arrival of live stock at destination, held sufficient, irrespective of whether given before or after unloading and mingling the animals with other stock. Chesney v. Union Pac. R. Co., 209 Ill. App. 494.

Ten Days.

A requirement that written notice of injury to livestock shall be given a carrier within ten days after the unloading of injured animals, is reasonable and valid. Olson v. Chicago, Burlington & Quincy R. Co., —C. C. A.—, 250 Fed. 372.

Four Months.

A shipper is bound by a condition of a bill of lading to the effect that, as a condition to the liability of the carrier, a written claim of loss or damage to an interstate shipment shall be given the latter within four months at the place of origin or delivery of the goods. Cudahy Packing Co. v. Atchison, Topeka & Santa Fe R. Co., — Mo. App. —, 201 S. W. 623.

A requirement for the giving of notice of loss of an interstate shipment within four months is reasonable and valid. Hamilton v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 270.

A condition of a bill of lading that a carrier shall not be liable for loss of or injury to interstate freight unless the owner shall give the carrier written notice of his claim for damages within four months, is reasonable and valid. Houston, East & West Texas R. Co. v. Houston Packing Co., —Tex. Civ. App.—, 203 S. W. 1140.

The giving between September 1st and 26th, of a notice of damage for the wrongful delivery of an interstate shipment by a terminal carrier on May 6th, is a sufficient compliance with a requirement of a bill of lading for giving notice within four months after the delivery of the property, or within the same period after a reasonable time for making delivery. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

(e) Effect of Noncompliance.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 67, and Vol. II, p. 34.

In General.

The failure of a shipper to make a claim for the loss of an interstate shipment within the time prescribed by the contract of carriage, will bar a recovery therefor. Hamilton v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 270.

The failure of a shipper to give a carrier written notice of injury to or loss of an interstate shipment within the time stipulated in the bill of lading, will bar a recovery. Nashville, Chattanooga & St. Louis R. Co. v. Camper — Ala.—, 78 So. 925.

The failure of the plaintiff to show compliance with a condition of a contract for the interstate transportation of live stock requiring that written notice of injury thereto be given the carrier within one day, and before the animals are removed from destination or mingled with others, will bar a recovery. Nashville, Chattanooga & St. Louis R. Co. v. Camper, — Ala. —, 78 So. 925.

The failure of the plaintiff to comply with a requirement of an interstate live stock shipping contract for giving written notice of loss or damage to agent of a carrier before the stock is removed at destination and mingled with other animals, will bar a recovery. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 175 Pac. 539.

(g) What Losses Within Requirement For.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 67, and Vol. II, p. 35.

See also under Carmack Amendment, infra XI, I, 6.

Conversion of Shipment by Carrier.

A shipper's claim against a carrier for the conversion of an interstate shipment by making delivery without the surrender of an "order" bill of lading, is within a requirement of the contract of affreightment that claims for damages, including those for failure to deliver, must be made in writing within four months. Midland Linseed Co. v. American Liquid Fireproofing Co., — Iowa, —, 166 N. W. 573.

Failure to Complete Transportation.

A claim for damages for the failure of a carrier to complete the interstate transportation of live stock because of a Federal quarantine, is not within the requirement of a bill of lading for giving written notice of damages to the carrier before the removal of the stock at destination or place of delivery, where the carrier abandons the contract of carriage and returns the stock to the shipper at the place of consignment. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

(h) Form and Sufficiency of Notice.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 69-70, and Vol. II, p. 35.

Form and sufficiency of notice under Carmack Amendment, see infra XI, J, 4.

In General.

While a substantial compliance with the provision of an interstate contract of affreightment for the giving of written notice of loss or damages claims, is all that is necessary, yet the notice must be one of a claim or intended claim and not merely that the shipment was damaged. Cudahy Packing Co. v. Atchison, Topeka & Santa Fe R. Co., — Mo. App. —, 201 S. W. 623.

Written notice to a carrier of the damaged condition of an interstate shipment which does not show that a claim will be made for the loss, is not a sufficient compliance with a condition of the contract of affreightment for the giving, as a condition to the liability of the carrier, of written notice of loss or damage claims within a designated period. Cudahy Packing Co. v. Atchison, Topeka & Santa Fe R. Co., — Mo. App. —, 201 S. W. 623.

Where, at destination, the local freight agent of a carrier inspected an interstate shipment and found it in a damaged condition, without the shipper saying anything about an intention to make a claim for damages, and the next day the latter wrote the former to the effect that "this is to confirm our verbal notice of the poor condition" of the goods, there was not a sufficient compliance with a requirement of the bill of lading for giving written notice of loss or damage claims. Cudahy Packing Co. v. Atchison, Topeka & Santa Fe R. Co., — Mo. App. —, 201 S. W. 623.

Action as Notice.

The bringing of an action against a railway company for damages to an interstate shipment is, under U. S. Comp. St. 1916, § 8640a, providing that no notice of the filing of damage claims shall be necessary as a condition precedent to a recovery against a carrier for injuries to an interstate shipment while being loaded or unloaded, or when due to delay or to carelessness or negligence in transit, a sufficient compliance with a requirement a bill of lading for giving written notice of damage claims within four months. Van Lindley Nursery Co. v. Southern R. Co., — S. C. —, 96 S. E. 221.

Telegrams.

A telegram to the officers of a carrier stating that an interstate shipment of live stock was liable to suffer damages from intensely cold weather, is not a compliance with a requirement for giving written notice of injury or loss, so as to permit a recovery for subsequent injuries from stress of weather. Olson v. Chicago, Burlington & Quincy R. Co., — C. C. A. —, 250 Fed. 372.

A telegram from a consignor notifying a carrier that he would hold it liable for damages for delay and diversion of an interstate shipment, is a sufficient compliance with a requirement of the bill of lading for written notice of damage claims. King v. Boyd, 201 Mich. 436, 167 N. W. 901, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 11.

Letters.

A letter from a consignee to a carrier at destination stating the arrival of an interstate shipment of meat in bad condition, the probable cause, the failure of the carrier to place the car promptly, and asking the carrier to investigate the matter, and saying that a damage claim would be filed, is a sufficient compliance with a requirement of the bill of lading for giving written notice of claims for loss or damage. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

Compliance with a requirement of a contract of affreightment for giving notice of

loss or damage claims to a carrier is not shown by a letter to the latter at destination stating that an interstate shipment of meat was "soft and smeary," and requesting the carrier to mail the consignee a report. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

Oral Notice.

A carrier cannot accept oral notice in lieu of the written notice of a damage claim which the contract of transportation requires. Olson v. Chicago, Burlington & Quincy R. Co., —C. C. A.,— 250 Fed. 372.

Reports by Agent of Carrier.

Where an interstate shipment of berries was inspected by the proper agent of a carrier at destination and the result of his inspection showing the extent of the injury to the shipment, was reduced to writing and delivered to the consignee, and presumptively to the higher officers of the carrier, and the consignee confined his claim for damages to the exact injury found by such inspector, there was a sufficient compliance with a requirement of the bill of lading for the giving of written notice to the carrier of damage claims within a specified time. Emery & Co. v. Wabash R. Co., — Iowa. —, 166 N. W. 600.

Where, on the arrival of an interstate shipment of berries at destination, an agent of the carrier made a written report on a company form and an endorsement on the plaintiff's bill of lading, to the effect that the contents of the car had shifted, that many of the cases were broken, the contents on the floor, and that they showed evidence of rough handling, and on the next day the consignee filed a written notice with the carrier describing the shipment and stating that "this is to notify you that, in due time, we will file a claim for damages, * * * as per inspection report of which you have been furnished a copy," there was a sufficient compliance, although no further notice was given, with a condition of the bill of lading for giving written notice of damages within a specified time. Emery & Co. v. Wabash R. Co., — Iowa, —, 166 N. W. 600.

Actual Knowledge of Carrier.

The fact that the freight claim agent of a carrier knew of the damaged condition of an interstate shipment does not dispense with the written notice of damages claims which the bill of lading requires the shipper to give within a specified time as a condition to the liability of the carrier. Cudahy Packing Co. v. Atchison, Topeka & Santa Fe R. Co., — Mo. App. —, 201 S. W. 623.

(i) Service.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 70, and Vol. II, p. 36.

Service under provisions of Carmack Amendment, see infra XI, J, 5.

In General.

Evidence that a shipper's written notice of a claim for injuries to an interstate shipment, was given to the "Commercial Agent" of a carrier, held not sufficient to show that he was authorized to receive it. Midland Linseed Co. v. American Liquid Fireproofing Co., — Iowa, —, 166 N. W. 573.

Where Served.

The delivery to the freight claim agent of a carrier at a place other than that of the origin or delivery of an interstate shipment, of a notice of damages for the wrongful delivery by a terminal carrier of an interstate shipment without the production of an "order bill of lading," is a sufficient compliance with a requirement of the bill for giving such notice at the place of origin or delivery of the shipment. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

When an interstate shipping contract requires notice of loss or damage claims to be given a carrier at point of delivery or of origin of shipment, notice given to the general freight claim agent at a different place is not sufficient. Cudahy Packing Co. v. Bixby, Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

(j) Waiver.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 70-73, and Vol. II, p. 37.

Waiver of notice in actions under Carmack Amendment, see infra XI, J, 7.

Burden to establish a waiver, see infra XIII, G, 5.

Right of Carrier to Waive Notice.

A carrier cannot waive a shipper's failure to comply with a condition of an interstate bill of lading requiring the giving to the carrier, as a condition to its liability, of a written claim for loss, damage or delay, within a stipulated period, since to do so would permit the giving of a preference in violation of the Act Regulating Commerce. Cudahy Packing Co. v. Chicago & Northwestern R. Co., — Mo. App. —, 201 S. W. 596.

The interstate Commerce Commission cannot either expressly or impliedly permit a carrier to waive or ignore requirements of bills of lading requiring a shipper, as a condition to his right of action

against a carrier, to give written notice of his claim for damages within a specified time. Houston, East & West Texas R. Co. v. Houston Packing Co., — Tex. Civ. App. —, 203 S. W. 1140.

A carrier cannot, either expressly or by implication, waive the noncompliance by a shipper with a condition of an interstate shipping contract requiring the giving of written notice of loss or damage claims within a designated period. Houston, East & West Texas R. Co. v. Houston Packing Co., — Tex. Civ. App. —, 203 S. W. 1140.

A carrier cannot waive a requirement of an interstate live stock shipping contract for the giving of notice of loss or injury within five days. Meyers v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., — App. Div. —, 171 N. Y. Supp. 71.

A carrier cannot waive a requirement for giving written notice of injury to live stock within ten days after unloading, and accept oral notice instead. Olson v. Chicago, Burlington & Quincy R. Co., — C. C. A. —, 250 Fed. 372.

A carrier cannot waive a condition of an interstate shipping contract that unless a claim for loss, damage or detention is presented within ten days after the unloading of live stock at destination and before it is mingled with other stock, the claim shall be deemed waived. Hart v. Oregon Short Line R. Co., 207 Ill. App. 290.

There cannot be a waiver of a requirement of an interstate contract of affreightment that a shipper, as a condition precedent to a carrier's liability for loss of or injury to live stock, shall give written notice of his claim to the carrier before the stock is removed from destination or place of delivery and mingled with other animals. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S. W. 638.

What Constitutes Waiver.

A requirement that a written notice of loss or damages claims should be given within four months, is waived by the conduct of the carrier, where, after the expiration of that period, it suggested to a shipper that he present his damage claim, which the carrier entertained on its merits, without denying liability for want of proper notice until fifteen months after the expiration of the time for giving the same. Cheney Piano Action Co. v. New York Central & Hudson R. R. Co., 85 Misc. 157, 148 N. Y. Supp. 1081 affirmed 166 App. Div. 706, 152 N. Y. Supp. 285 affirmed — N. Y. —, 118 N. E. 1050.

Where a carrier considered a damage claim on its merits without questioning until a year later the sufficiency of the notice given by the shipper, under certain orders of the Interstate Commerce Commission, and by its conduct, the carrier waived the shipper's noncompliance with a provision of the bill of lading relieving the carrier from liability for loss or damage unless written notice of the claim was filed within a certain time. Emery & Co. v. Wabash R. Co. — Iowa —, 166 N. W. 600.

A provision of an interstate shipping contract requiring that written notice of damage claims shall be given within four months, is sufficiently complied with where a shipper and carrier negotiated a settlement by letter before the expiration of such period, and after the elapse thereof the carrier rejected the claim because of the shipper's noncompliance with the four month's clause. Chicago, Rock Island & Pac. R. Co. v. Pruitt, — Okla. —, 171 Pac. 718.

An oral notice to a carrier of an injury to an interstate shipment of live stock and the subsequent investigation of the claim by the carrier on its merits, is not a waiver of a requirement of the shipping contract for giving written notice of loss or damage within ten days from the time the stock is unloaded. Olson v. Chicago, Burlington & Quincy R. Co., — C. C. A. —, 250 Fed. 372.

By instructing a consignee to purchase a new article to replace one lost during transportation and promising to pay for the same, a carrier waives a condition of an interstate bill of lading requiring the giving of written notice of damage claims within four months. Wells Fargo & Co. Express V. Townsend, — Ark. —, 204 S. W. 417.

The mere physical act of a carrier in receiving and investigating a claim for injuries to an interstate shipment after the expiration of the four months prescribed by the bill of lading for filing damage claims, would not, of itself, constitute a waiver of the claimant's nonobservance of the terms of the contract of affreightment, especially where the claim presented did not show the date the shipment was received. Pennsylvania Co. v. Piowaty, 207 Ill. App. 176.

A shipper's failure to give written notice of a claim for injury to an interstate shipment within the time required by the bill of lading, is waived by the carrier's omission to plead the same. King v. Boyd, 201 Mich. 436, 167 N. W. 901, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 11.

A carrier is not estopped from setting up the failure of a shipper to given notice of a loss or damage claim as required by an interstate bill of lading, because the defense is not asserted until the filing of a second amended answer. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W.

865, certiorari denied 248 S. U. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

7. Time for Bringing Action.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 73, and Vol. II, pp. 39-40.

In General.

A stipulation of an interstate shipping contract that no suit or action against the carrier for loss, damage or delay, shall be sustainable in any court unless commenced within six months after the cause of action accrues, is reasonable and valid. St. Louis, Iron Mt. & Southern R. Co. v. Bentley, — Okla. —, 176 Pac. 250.

A provision of an interstate contract for the carriage of live stock fixing 91 days as the time for bringing actions for damages, is legal and binding, and an action thereafter brought is barred. Ezell v. Midland Valley R. Co., —Okla. —, 174 Pac. 781.

An action to recover for injuries to an interstate shipment made prior to the enactment of the Cummins Amendment, is barred when not brought within ninety-one days, as required by the terms of the contract of carriage. Overstreet v. Wichita Falls & N. W. R. Co. —, Okla. —, 175 Pac. 354.

Where an interstate contract of shipment of cattle fixes a time within which an action must be brought for loss or injury, the time begins to run from the date of delivery of the cattle at destination rather than from the subsequent death of the animals. Ezell v. Mildand Valley R. Co., —Okla. —, 174 Pac. 781.

Waiver.

A carrier cannot waive the failure of a shipper to bring an action for injury to an interstate shipment within the time prescribed in the bill of lading. Mersfelder v. Atchison, Topeka & Santa Fe R. Co., — N. M. —, 174 Pac. 989.

A requirement of a contract of carriage made prior to the enactment of the Cummins Amendment, that actions for injury to interstate shipments must be commenced within ninety-one days, cannot be waived by the conduct of the carrier. Overstreet v. Wichita Falls & N. W. R. Co., —Okla. —, 175 Pac. 354.

A condition of contract of affreightment requiring an action for injury to an interstate shipment to be brought within ninety-one days, cannot be waived by the conduct of a carrier in retaining the claim beyond such period for consideration on its merits, and informing the claimant that it would be paid. Cudahy Packing Co. v. Missouri, Kansas & Texas R. Co., — Tex. Civ. App. —, 206 S. W. 854.

VII. CARRIERS OF LIVE STOCK.*

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 75-84, and No. 4, pp. 17-34, and Vol. II, pp. 40-42.

Effect of Carmack Amendment on limitation of carrier's liability for live stock, see infra XI, I, 4, (m).

Effect of Carmack Amendment on requirements for notice of injury or loss of live stock, see infra. XI, J.

Requirements as to notice of claims for injury to or loss of live stock, see supra VI, I, 6.

Validity in general of limitation of carrier's liability with respect to live stock see supra VI, I.

Validity under Carmack Amendment of requirement for notice of damage claims see infra XI, J.

A. In General.

See generally Federal Ry. Digest, Vol. I, No. 4, pp. 28-33.

1. Validity and Construction of the 28-Hour Act.

See also same section Federal Ry. Digest, Vol' I, No. 4, p. 17.

Purpose of Law.

The purpose of the Federal 28-Hour Live Stock Act is to save cattle from suffering. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

There is nothing in the 28-Hour Act indicating a purpose to interfere with a carrier's discretion in establishing schedules for trains moving live stock; the design of the law being to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances pointed out. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

Construction.

The 28-Hour Act must be construed with a view to carrying its humanitarian purpose into effect. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

C. Live Stock Quarantines.

In General.

The matter of the quarantine of live stock for shipment or transportation from

*For text of Federal 28-Hour Law see Vol. I, No. 3, Federal Ry. Digest, p. 184.

one state to another is a branch of interstate commerce. State v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 206 S. W. 419.

The Act of Congress of March 3, 1905, 36 Stats. p. 1264, c. 1496 (U. S. Comp. Sts. 1916, §8701) permitting the Secretary of Agriculture to establish and maintain live stock quarantines and regulate the movement of live stock, is exclusive, and supersedes all state laws on the same subject with respect to the interstate transportation of live stock, even though the Secretary of Agriculture fails to establish a quarantine. State v. Chicago, Milwaukee & St. Paul R. Co. — Mo. —, 206 S. W. 419.

Establishment.

The Secretary of Agriculture cannot lawfully establish a live stock quarantine until notice is given a carrier both by publication and by personal service. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

An allegation that a carrier had been given notice of the establishment of a live stock quarantine by the Secretary of Agriculture, and that the order had become effective, is not a defense to an action against the carrier for failure to complete the interstate transportation of live stock, since such allegation is but a conclusion of law, and does not show the establishment of the quarantine in the manner required by the Federal laws. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

Liability of Carrier When Transportation Precluded by Quarantine.

When a carrier accepts live stock for interstate transportation without informing the shipper of a Federal quarantine, the former is answerable in damages for its abandonment of the contract of carriage and return of the stock to the shipper at the place of consignment. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

D. Injuries to Stock Awaiting Shipment.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 75.

(No new decisions.)

F. Duty to Unload for Feed, Water and Rest.

See generally same section Federal Ry. Digest, Vol. I, No. 3, p. 75, No. 4, pp. 18-27, and Vol. II, p. 40.

1. In General.

Feeding in General.

What constitutes a proper feeding of live stock, within the meaning of the 28-Hour Act, must be determined in the light of the facts of a given case. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

The requirement of the 28-Hour Act for unloading cattle from cars for feed, water and rest is not limited to stock which has been confined in cars without feed, but includes all cattle which have been in transit for 28 hours. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

Right of Shipper to Direct How Carrier Shall Feed Stock.

A shipper who refuses to feed live stock in transit cannot dictate the manner in which the duty to feed them shall be performed by the carrier. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

Computing Period of Confinement. — Stock Received From Connecting Carrier.

A connecting carrier which fails to unload live stock as required by the 28 Hour Act is liable for the prescribed penalty notwithstanding that a preceding carrier had kept them confined beyond the statutory limit. United States v. Chicago, Milwaukee & St. Paul R. Co., — C. C. A. —, 250 Fed. 442, reversing 234 Fed. 386.

The time during which cattle have been confined by a connecting carrier must be included in the computation of the period of confinement permitted by the 28-Hour Act. Grand Trunk Western R. Co. v. United States, — C. C. A. —, 248 Fed. 905.

— Confinement by Canadian Road.

A domestic carrier is chargeable with a violation of the 28-Hour Act although a portion of the time of confinement of stock occurs while in the possession of a carrier in the Dominion of Canada wherein the shipment originates. Grand Trunk Western R. Co. v. United States, — C. C. A. —, 248 Fed. 905.

4. Defective and Insufficient Pens.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 77, No. 4, p. 18, and Vol. II, p. 40.

Cattle Breaking From Defective Pens.

An interstate shipper may recover damages where, in reliance on the assurance of a station agent that live stock would be moved on a designated train, he left part of the animals in a car and the remainder in a pen ready for loading for nearly a day without having facilities for feeding and

watering them, and some of them broke loose and escaped. Chicago, Rock Island & Pac. R. Co. v. Stallings, — Ark. —, 201 S. W. 294.

9. Liability for Failure to Unload.

See also same section Federal Ry. Digest, Vol. I, No. 3, pp. 80-83, No. 4, pp. 21-26, and Vol. II, p. 41.

(a) In General.

Violation of Act in General.

The requirements of the 28-Hour Act that live stock must be unloaded for feed, water and rest, is not met by any substitute provisions for feeding in transit. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

If, in the exercise of ordinary care, prudence and foresight, a carrier reasonably expects that following the determined schedule a car containing live stock will reach destination, or some unloading point, within the time prescribed by the 28-Hour Act, it may properly be put in transit; it thereafter being the duty of the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays, and to overcome the effect of any which may happen, with an honest purpose always to secure unloading within the lawful time, unless prevented by storms, accidental, or unavoidable causes. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

(d) Liability for Damages.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 81, and No. 4, p. 24.

In General.

A shipper may recover damages arising from a carrier's refusal to permit the unloading of horses shipped in interstate commerce, as required by the Federal law, although transported under a uniform live stock contract. Dickerson v. Erie R. Co. — App. Div. —, 169 N. Y. Supp. 5.

(e) Justification and Excuse.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 82, and No. 4, p. 25.

In General.

The exceptions of the 28 Hour Act in favor of carriers must be given proper latitude and be enforced in the light of practical railroad conditions. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

Accidental and Unavoidable Delays.

In order to satisfy the 28 Hour Act a carrier need not exercise whatever ingenuity human intelligence can devise and put into operation (having in mind the practical operation of a railroad, the purpose of the law, the movement of trains and the keeping of the road open), in the way of safeguards and provisions to get live stock from origin of shipment to destination within the statutory period. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

The 28 Hour Act is not violated when two unavoidable delays near destination caused by the breaking of a drawbar and the bursting of an air hose, prevented the unloading of cattle within the required time, although had a faster schedule been adopted on the earlier stages of a long journey, the shipment would have arrived at destination on time despite such delays. Chicago & Northwestern R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351, reversing 148 C. C. A. 170, 234 Fed. 268.

The fact that an unavoidable accident near destination prevented a carrier from delivering live stock before the expiration of the 28 hour period, will not relieve the carrier from liability for the statutory penalty, if, by the exercise of due diligence during the early portion of a long journey, the stock might have been delivered at destination within 28 hours, notwithstanding such accident. Chicago & N. W. R. Co. v. United States, 148 C. C. A. 170, 234 Fed. 268, reversed 246 U. S. —, 62 L. ed. —, 38 Sup Ct. Rep. 351.

A carrier's conviction for violating the 28 Hour Act is justified where, despite two excusable accidental delays within 16 miles from destination, about 3 hours were consumed in running such distance after stock had, with the consent of the owner, been confined for 36 hours. Chicago & N. W. R. Co. v. United States, 148 C. C. A. 170, 234 Fed. 268, reversed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351.

The jury may, in an action for the penalty prescribed by the 28 Hour Act, take into consideration the confinement and transportation of the stock from inception to unloading and determine therefrom whether, if due diligence had been used during the early stages of the journey, the stock might have been delivered at destination within the statutory period notwithstanding a delay near destination in consequence of an unavoidable accident. Chicago & N. W. R. Co. v. United States, 148 C. C. A. 170, 234 Fed. 268, reversed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 351.

12. Termination of Liability.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 26, and Vol. II, p. 41.

In General.

Unless a carrier delivers live stock at a place where it can be unloaded, that is, where its confinement can be brought to an end, it fails to discharge the duty imposed by the 28 Hour Act, if in consequence animals are confined in cars beyond the statutory period, and if such conduct is knowing and willful the carrier is liable for the prescribed penalty. United States v. Philadelphia & Reading R. Co., — C. C. A. —, 247 Fed. 469, reversing 238 Fed. 428.

When a carrier had knowledge that the seriously congested condition of its line was likely to and did cause unexpected delays, and that even under normal conditions a shipment of live stock could arrive at destination but a short time before the expiration of the period of their lawful confinement, the 28 Hour Act was knowingly and willfully violated where cattle were started from a feeding point on the final stage of their journey without having been unloaded for feed and rest, and ensuing delays prevented their arrival at destination until after they had been confined in the cars for more than 36 hours. Philadelphia & Reading R. Co. v. United States, — C. C. A. —, 247 Fed. 466 affirming 238 Fed. 428.

There is a violation of the 28 Hour Act where, on the arrival of live stock shortly before the expiration of the permissible period of confinement, but a portion of the cars could be placed at the unloading chutes, after which the switch engine went to other duties, and the great congestion of freight in the yard prevented it returning and placing the remainder of the cars for unloading until after the expiration of the statutory period. United States v. Philadelphia & Reading R. Co., — C. C. A. —, 247 Fed. 469, reversing 238 Fed. 428.

14. Liability for Cost of Feed and Water.

See also Federal Ry. Digest, Vol. I, No. 3, p. 83.

Liability of Shipper.

When a carrier has performed the duty of feeding live stock in transit as required by the 28 Hour Act, it may recover the reasonable expense thereof from the shipper. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

Where a shipper placed from 150 to 200 pounds of hay in a car to sustain live stock during a 24 hour trip, and en route the carrier supplied 250 pound additional, the fact that the Department of Agriculture has held that 250 pounds is a sufficient feeding for such a journey does not limit the right of the carrier to recover from the shipper for but 100 pounds of hay. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

G. Transportation of Infected Animals.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 83-84, and No. 4, p. 27.

(No new decisions.)

H. Penalties.

See generally Federal Ry. Digest, Vol. I, No. 4, pp. 28-33, and Vol. II, p. 42.

(No new decisions.)

VIII. LIABILITY OF CARRIER FOR LOSS OF OR INJURY TO SHIPMENTS.

See generally same section Federal Ry. Digest, Vol. I, No. 3, pp. 84, 85, and Vol. II, p. 42.

Liability of carrier under Carmack Amendment, see infra XI.

Liability under Cummins Amendment, see infra XII.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 84, Vol. II, p. 42.

Act of God.

In order to recover in a state court for an injury to an interstate shipment resulting from the Act of God, the plaintiff must, in accordance with the rules of the Federal courts, prove contributory negligence on the part of the carrier. Heineman v. Erie R. Co., — App. Div. —, 172 N. Y. Supp. 111.

Floods.

— Concurrent Negligence.

A carrier's antecedent negligent delay in moving an interstate shipment, without other acts of negligence, is not sufficient to render it liable for the subsequent destruction of the property by an extraordinary and unprecedented flood. Toledo & Ohio Cent. R. Co. v. Kibler & Bros. Co., — Ohio, —, 119 N. E. 733, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 10.

A carrier is answerable for the destruction of an interstate shipment by an extraordinary and unprecedented flood where it failed to exercise due care to protect the property after discovery of the impending peril. Toledo & Ohio Cent.

R. Co. v. Kibler & Bros. Co., — Ohio —, 119 N. E. 733, certiorari denied —, U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 10.

Effect of Commingling Different Shipments.

Where a carload of freight belonging to two persons was billed to one consignee, the delivering carrier cannot collect from each owner, under rule 6 of the Western Classifications, the minimum carload rate, since ownership cannot be made the test by which the charges are to be measured; and by selling part of the goods for such charges the carrier is guilty of a conversion. St. Louis & San Francisco R. Co. v. First Nat. Bank of Elk City, — Okla. —, 171 Pac. 467.

The fact that the plaintiff, in violation of the Act Regulating Commerce, loads with his own live stock cattle owned by several different persons, and makes carload shipments in the names of several other persons, so that they obtain free transportation as caretakers, does not deprive the plaintiff of the right to recover for injuries to the shipment due to the carrier's negligence. Chicago, Rock Island & Gulf R. Co. v. Manby, — Tex. Civ. App. —, 207 S. W. 157.

Effect of Failure to Issue Bill of Lading.

A carrier is answerable for the destruction by fire of goods accepted for interstate transportation although they had not been tagged or marked or a bill of lading issued. Galveston, Harrisburg & San Antonio R. Co. v. Compania Hulera de Monclova, — Tex. Civ. App. —, 204 S. W. 236.

Injury After Refusal to Pay Correct Charges.

A carrier is not answerable for the death of a horse from pneumonia contracted while remaining in a car at destination after the refusal of the owner to pay the difference between the correct tariff rate and the lower rate which was mistakenly quoted him by the agent of the initial carrier, and which the owner paid in advance. Blackford v. St. Louis, Iron Mt. & So. R. Co., — Ky. —, 203 S. W. 867.

Presumption of Negligence.

The presumption of negligence on the part of a common carrier arising from a showing of the sound condition of property at the time of shipment and the injured and damaged condition thereof at destination, does not apply where, under an interstate transportation contract, the shipper or his agent accompanies the shipment for the purpose of taking care of the property in transit; the cause of the injury not being shown to be a matter outside the duties and obligations of the caretaker, or in respect to a matter of which his presence did not relieve the carrier from the obligation imposed upon him by law. Zimmerman v. Northern Pac. R. Co., — Minn. —, 167 N. W. 546.

Refusal of Frostbitten Fruit.

Where interstate freight tariffs require a carrier, at the option of a shipper, to carry fruit at the former's risk from frost or freezing, it cannot refuse to accept apples for interstate transportation because they are frostbitten, especially when the consignor offers to indemnify the carrier; since the latter is liable only for its own conduct which contributes to the injury of the fruit. Spokane Valley Growers' Union v. Spokane & Inland Empire R. Co., — Wash. —, 175 Pac. 184.

B. Delays.

In General.

A carrier is not answerable for a delay of two hours and forty-two minutes in moving an interstate shipment of live poultry when caused by the necessity for replacing a set of wheels which, in transit, were found worn through the chill or tread so as to be in a dangerous condition in consequence of continuous wear and not from unusual or unfair handling. Fleck & Hillman v. Delaware, Lackawanna & Western R. Co., — App. Div. —, 172 N. Y. Supp. 129.

A carrier is answerable for deterioration of an interstate shipment of corn in consequence of an unreasonable delay in transporting it, due to abnormal conditions brought about by the war, where the carrier accepted the shipment with knowledge that it could not be transported to destination within a reasonable time without notifying the shipper of that fact. Conover v. Wabash R. Co., 208 Ill. App. 105.

The fact that an unreasonable delay in moving an interstate shipment of live stock is due to permitting the train crew to rest as required by the Federal laws, is no defense to an action against the carrier for damages caused by such delay, since it will be presumed that the carrier had other crews which could have kept the shipment moving. Kansas City, Mexico & Orient R. Co. v. Cliett, —Tex. Civ. App. —, 207 S. W. 166.

A carrier cannot contract for the through and direct transportation of an interstate shipment so as to render it liable for a delay caused by a necessary wait

for the first local train which could complete transportation to a point at which the through train did not stop. Adams Express Co. v. Burr Oak Jersey Farm, — Ky. —, 206 S. W. 173.

C. Diversion of Shipment.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 84, and Vol. II, p. 43.

Delay and Diversion Due to Embargo.

When a carrier, with knowledge of an embargo on live stock shipments, without notifying the consignor of that fact, accepts an interstate shipment, the carrier is liable for a delay and diversion resulting from unnecessarily unloading the stock for feed and water within the embargo territory. King v. Boyd, 201 Mich. 436, 167 N. W. 901, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 11.

D. Effect of Illegality of Contract of Carriage.

See same section Federal Ry. Digest, Vol. I. No. 3, p. 84.

(No new decisions.)

IX. TRANSPORTATION OF NURSERY STOCK.

See same section Federal Ry. Digest, Vol. I. No. 4, p. 34, and Vol. II, p. 43.

(No new decisions.)

X. INTEREST OF CARRIER IN COMMODITIES TRANSPORTED.

See also same section Federal Ry. Digest, Vol. I, No. 4, pp. 34-36.

Who May Question.

A person who merely alleges that he holds 10 shares of the capital stock of a railway company of "substantial value" without stating what that value is (the market reports showing it to be between $5 and $6.50 per share) or when he acquired the same, does not show sufficient equities to permit him to enjoin the carrier from violating the commodities clause of the Interstate Commerce Act by owning and operating a coal mine under an independent corporation controlled by the railway company, and for a receiver for the coal company, where such conduct has been unchallenged for seven years. Ketchum v. Denver & Rio Grande R. Co., — C. C. A. —, 248 Fed. 106.

XI. CARMACK AMENDMENT.*

See generally Federal Ry. Digest, Vol. I, No. 2, pp. 12-58, No. 3, pp. 85-95, No. 4, p. 36, and Vol. II, pp. 43-55.

A. In General.

See generally Federal Ry. Digest, Vol. I, No. 2, p. 12, and Vol. II, p. 43.

Purpose and Effect of Act.

The Carmack Amendment was enacted in order to create in the initial carrier unity of responsibility for the transportation of an interstate shipment. Southern R. Co. v. Lewis & Adcock Co., — Tenn. —, 201 S. W. 131.

The rights of the parties to an action in a state court against a carrier based on the Carmack Amendment, depends wholly upon the Federal statute, the bills of lading, and the rules of the common law as accepted and applied in the Federal courts. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co., — Vt. —, 102 Atl. 940.

The effect of the Carmack Amendment is to give to the lawful holder of a bill of lading a property right in an interstate shipment, so far as a claim for loss, damage or injury is involved. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

Application to Actions for Personal Injuries.

The Carmack Amendment does not apply to the transportation or injury of persons, but deals exclusively with the shipment of property. Chicago, Rock Island & Pac. R. Co. v. Maucher, — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 108, affirming 100 Neb. 237, 159 N. W. 422.

Retroactive Effect.

The Carmack Amendment does not apply to a cause of action originating six years before the passage of that act. Missouri, Kansas & Texas R. Co. v. Sealy, — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 97, dismissing writ of error to 98 Kan. 225, 158 Pac. 62.

Effect on Common-Law Liability.

By the Carmack Act Congress has relieved carriers of interstate shipments from their common-law liability as insurers; the responsibility imposed by such act on initial carriers being limited to losses, injuries, or damages caused by them or any succeeding carriers to whom the property may be delivered for carriage, and such damages must be attribu-

*For text of Carmack Amendment see No. 2, Vol. I, Federal Ry. Digest, p. 394.

table to some breach of duty or default on the part of the carrier. Atlantic Coast Line R. Co. v. Sandlin, — Fla. —, 78 So. 667.

If the plaintiff is entitled to recover for an injury to an interstate shipment the provisions of the Carmack Amendment should be accorded appropriate effect in determining the liability of the carrier. Nashville, Chattanooga & St. Louis R. Co. v. Camper, — Ala. —, 78 So. 925.

B. Validity.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 13-15.

(No new decisions.)

C. Construction.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 14, No. 3, p. 85, and Vol. II, p. 43.

Federal Decisions Binding on State Courts.

When considering interstate freight shipment state courts are bound by the Carmack Amendment, and the construction placed thereon by the Supreme Court of the United States. Barnet v. New York Central & Hudson R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

D. Effect.

See generally Federal Ry. Digest, Vol. I, No. 2, pp. 14-19, No. 3, pp. 84-85, No. 4, p. 36, and Vol. II, p. 43.

2. On State Laws.

See generally Federal Ry. Digest, Vol. I, No. 2, p. 15, No. 3, p. 85, No. 4, p. 36, and Vol. II, p. 43.

Application generally of state laws to interstate transportation, see supra II, C.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 15, No. 3, p. 85, No. 4, p. 36, and Vol. II, p. 44.

State Laws Superseded.

The specific effect of the Carmack Amendment is to supersede the special regulations and policies of particular states upon the subjects of contracts respecting interstate shipments, and the carrier's liability for the loss of or injury thereto. Atlantic Coast Line R. Co. v. Sandlin.—Fla.—, 78 So. 667.

The Carmack Amendment supersedes all state laws pertaining to interstate shipments of goods. Barnet v. New York Central & Hudson R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

(b) Laws Relating to Particular Subjects.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 16-18, No. 3, pp. 85-86, and Vol. II, p. 44.

Application generally of state laws to interstate transportation, see supra II, C.

Actions Against Connecting Carriers.

A state statute authorizing suits against the last of several connecting carriers receiving goods "as in good order," was superseded by the Carmack Amendment in so far as the state law applies to interstate shipments. Southern R. Co. v. Morris, — Ga. —, 95 S. E. 284, reversing 19 App. Ga. 878, 91 S. E. 878, S. C. — Ga. App. —, 95 S. E. 741.

4. Of Saving Clause in Carmack Amendment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 19, No. 3, p. 86, and Vol. II, p. 44.

What Laws Within.

The proviso of the Carmack Amendment "that nothing in the act shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws," preserves only rights and remedies under the Federal and common law, which are not inconsistent with the rules and regulations prescribed by such act. Southern R. Co. v. Morris, — Ga. —, 95 S. E. 284, reversing 19 Ga. App. 878, 91 S. E. 878, S. C. — Ga. App. —, 95 S. E. 741.

E. What Carries Within Act.

See generally Federal Ry. Digest, Vol. I, No. 2, pp. 19-20, and Vol. II, p. 44.

(No new decisions.)

F. What Shipments Within Act.

See generally Federal Ry. Digest, Vol. I, No. 2, pp. 20-21, No. 3, p. 86, and Vol. II, p. 44.

(No new decisions.)

G. Delivery to Carrier.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 21.

(No new decisions.)

H. Contract of Affreightment.

See generally Federal Ry. Digest, Vol. I, No. 2, p. 22, No. 3, p. 86, and Vol. II, pp. 45, 46.

1. In General.

See also same section Vol. II, p. 45.

Construction.

Under the Carmack Amendment a bill of lading issued by an initial carrier for interstate transportation of property is to be construed as the contract of all the connecting carriers. Gallagher v. Grand Trunk Western R. Co. 207 Ill. App. 316.

"Order Bills of Lading." — For Whose Benefit.

Under the Carmack Amendment a requirement of an "order bill of lading" for an interstate shipment requiring the surrender of the bill before the delivery of the property, is for the benefit of the consignor and not for the sole benefit of the carrier. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

— Who Lawful Holder.

Under the Carmack Amendment the consignor of an interstate shipment is the lawful holder of an "order bill of lading" with draft attached, which he deposited with a bank for collection, and which was dishonored by the drawee. Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

5. Effect of Failure to Issue Bill of Lading.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 23, No. 3, p. 87, and Vol. II, p. 45.

See also supra VIII, A.

In General.

The failure of an express company to issue a receipt for an interstate shipment as required by the Carmack Amendment, does not relieve it from liability to the consignor for a negligent delay caused by a connecting carrier. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

An express company's failure to issue a receipt for an interstate shipment as required by the Carmack Amendment, imposes upon such carrier the highest responsibility which the law will imply from the conduct of the parties, and the prompt delivery of the shipment to a connecting carrier will not relieve the initial carrier from liability for a subsequent negligent delay. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

8. Varying Original Contracts of Affreightment.

See also same section Federal Ry Digest, Vol. I, No. 2, p. 24.

Abandonment of Contract.

The Carmack Amendment was not intended to prevent the parties to an interstate contract of affreightment from abandoning the original contract to meet changed conditions. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S. W. 638.

Bill of Lading Issued by Connecting Carrier.

Where an intermediate carrier takes up the original bill of lading issued by an initial carrier for an interstate shipment, and issues a new one for the remainder of the route, it is void, and the original contract is controlling. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

A new bill of lading issued by a connecting carrier for the remaining portion of the route of an interstate shipment is valid where the contract made by the initial carrier is void for some reason. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

I. Contracts Limiting Liability of Carrier.

See generally Federal Ry. Digest, Vol. I, No. 2, pp. 25-37, No. 3, pp. 87-90, No. 4, p. 36, and Vol. II, p. 46.

See generally, supra VI, I.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 25, No. 3, p. 87, and No. 4, p. 36.

Against Liability Created by Act.

No contract may relieve a carrier from the liability created by the Carmack Amendment. Barnet v. New York Central & Hudson R. R. Co. 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

Illegal Conditions of Contract.

Illegal conditions and limitations in bills of lading are not validated by filing with the Interstate Commerce Commission. Boston & Maine R. R. v. Piper, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 354 affirming 90 Vt. 176, 97 At. 508.

3. To Lines of Particular Carrier.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 27, No. 3, p. 88, No. 4, p. 36, and Vol. II, p. 46.

Connecting Carrier.

The Carmack Amendment does not preclude a limitation of the liability of a connecting carrier to a shipper for such losses or injuries only as occur on its own line or portion of the through route. Southern R. Co. v. Lewis & Adcock Co., —, Tenn. —, 201 S. W. 131.

Waiver of Conditions of Nonliability.

A terminal carrier cannot waive a provision of an interstate bill of lading that no carrier shall be liable for loss or injury which does not occur on its own road or portion of the route. Southern R. Co. v. Lewis & Adcock Co., — Tenn. —, 201 S. W. 131.

4. Agreed Valuation.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 28-36, No. 3, pp. 88-89, No. 4, p. 36, and Vol. II, p. 46.

Effect of Cummins Amendment on stipulations as to value, see infra XII.

See also supra VI, I, 2.

In General.

Under the Carmack Amendment the parties to an interstate freight shipment may agree upon a valuation of property shipped for the purpose of charging the published freight rate based on such valuation. Bassett v. Chicago & Northwestern R. Co., — Wis. —, 169 N. W. 553.

When a shipper pays an alternative freight rate based on a valuation of an interstate shipment at $150, under the Carmack Amendment he thereby legally limits the amount he may recover for an injury to the shipment whether due to ordinary or gross negligence. Bassett v. Chicago & Northwestern R. Co., — Wis. —, 169 N. W. 553.

(g) Validity When But One Tariff Rate.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 32.

See also supra, VI, I.

In General.

A carrier cannot limit its liability for an interstate shipment where it does not have on file with the Interstate Commerce Commission an alternative higher rate with unlimited common-law liability. Hill Mfg. Co. v. New Orleans, Mobile & Chicago R. Co., — Miss. —, 78 So. 187.

(m) Live Stock.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 35, and No. 3, p. 89.

To Cost of Feed and Water When Delay.

A condition of a uniform live stock contract limiting a carrier's liability for unusual delays or detentions in the interstate transportation of cattle, when caused by the negligence of the carrier, to the sum expended by the shipper in the purchase of food and water for the animals, is void under the Carmack Amendment as a contract exempting the carrier from liability for negligence, notwithstanding that such condition was filed with the Interstate Commerce Commission. Boston & Maine R. R. v. Piper, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 354, affirming 90 Vt. 176, 97 Atl. 508.

(o) Value at Particular Time and Place.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 35, and No. 3, p. 89.

In General.

It is reversible error, in action under the Carmack Amendment, to admit proof of the value of goods at destination, where the bill of lading restricts damages to the value of the shipment at the place of shipment. St. Louis & San Francisco R. Co. v. First Nat. Bank of Elk City, — Okla. —, 171 Pac. 467.

A claim for damages resulting from a falling market in consequence of delay in transporting an interstate shipment of poultry, which suffered no physical injury, is, under the Carmack Amendment, within a condition of the contract of carriage that any loss or damage shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the time and place of shipment. Keeney v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 167 N. W. 475.

6. What Losses Within Terms of Limitation.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 36-37, No. 3, pp. 89-90, and Vol. II, p. 47.

(b) Losses Due to Negligence.

For previous decisions see same section Federal Ry. Digest, Vol. I, No. 2, p. 36, No. 3, p. 89, and Vol. II, p. 47.

In General.

A provision of an interstate express tariff limiting a carrier's liability to $50 under the rate paid for an interstate ship-

ment, does not apply to a loss resulting from a negligent delay on the part of a connecting carrier in making delivery to the consignee. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

J. Notice of Claims for Loss or Damage.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 37-45, No. 3, pp. 90-92, No. 4, p. 36, and Vol. II, p. 46.

See generally, supra VI, I, 6.

2. Validity of Requirement For.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 37-40; No. 3, pp. 90-91, No. 4, p. 36, and Vol. II, p. 47.

(b) Particular Periods.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 38-40, No. 3, p. 91, and Vol. II, p. 47.

See also generally supra VI, I, 6 (d).

Four Months.

A requirement of a bill of lading that claims for injuries to interstate freight, including those for failure to deliver, must be made in writing within four months, is reasonable and valid. Midland Linseed Co. v. American Fireproofing Co., — Iowa —, 166 N. W. 573.

A provision of an interstate bill of lading for filing written claims for damages within four months after the delivery of a consignment, is reasonable and valid. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co., — Vt. —, 102 Atl. 940.

7. Waiver.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 43-45, No. 3, pp. 91-92, and Vol. II, p. 48.

Waiver of notice of damage claims in general. See supra VI, 6, (j).

In General.

The failure of a person to make a claim for an injury to interstate freight within the time prescribed by the bill of lading, cannot, under the Carmack Amendment, be waived by a carrier. Keeney v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 167 N. W. 475.

K. Limitation of Time For Action.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 45-46; No. 3, p. 92, and No. 4, p. 36.

See also supra, VI, I, 7.

In General.

Under the Carmack Amendment, prior to the enactment of the Cummins Amendment, a stipulation in a contract of affreightment that actions for damages to an interstate shipment must be commenced within six months, was valid and binding, and a failure to comply therewith is a bar to an action. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 175 Pac. 539.

L. Liability of Initial Carrier.

See in general same section Federal Ry. Digest, Vol. I, No. 2, pp. 46-58, No. 3, pp. 92-94, and Vol. II, pp. 48-51.

1. In General.

See same section Federal Ry. Digest, Vol. I, No. 2, pp. 46-47, No. 3, p. 93, and Vol. II, p. 48.

Nature of Liability.

The liability of an initial carrier under the Carmack Amendment for an injury to or the loss of an interstate shipment on the line of a connecting carrier, is the common-law liability of the initial carrier which applies with respect to losses occurring on its own line. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co., — Vt. —, 102, Atl. 940.

In an action against a carrier for the loss of several separate interstate shipments there can be a recovery only for those as to which the defendant is the initial carrier. Hamilton v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 270.

The Carmack Amendment makes a carrier liable for some damages for goods lost or injured when shipped under a limited liability contract. Hill Mfg. Co. v. New Orleans, Mobile & Chicago R. Co., — Miss. —, 78 So. 187.

Implication of Negligence.

In an action under the Carmack Amendment, upon proof of the delivery to a common carrier of inanimate goods for transportation, and proof of their nondelivery at destination, the law implies that the loss was caused by the negligence of the defendant or by some cause for which it is responsible. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

Effect of New Bill of Lading Issued by Connecting Carrier.

When an intermediate carrier takes up the bill of lading issued by an initial carrier for an interstate shipment and issues a new one for the remaining portion of the route, the liability of the first carrier under the Federal law for the negligence of subsequent carriers is not affected, since the second contract is void. Chesapeake

& Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

The rule that when an intermediate carrier takes up the bill of lading issued by an initial carrier for an interstate shipment, and issues a new one in lieu thereof for the remaining portion of the journey, the new contract is void, is applicable only where the original contract is one which is enforceable under the Federal laws. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

Reconsigned Shipment.

Where a shipment made to a designated interstate point "for reconsignment," while in the possession of the initial carrier, was reconsigned to a more distant point on the line of another carrier, under the Carmack Amendment the initial carrier is liable for the negligence of the connecting carriers. L. Starks Co. v. Michigan Cent. R. Co., 207 Ill. App. 333.

When, by mistake of a shipper, an interstate shipment was carried to a wrong destination, the error being subsequently corrected by him, the initial carrier is not liable for a subsequent injury to the goods while on another line. Jeffcoat v. Atlantic Coast Line R. Co., — S. C. —, 96 S. E. 616

Under the Carmack Amendment an initial carrier is liable for an injury to an interstate shipment after a change of destination with the consent of such carrier. Chesney v. Union Pac. R. Co., 209 Ill. App. 494.

3. Effect of Failure to Issue Bill of Lading.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 48, and No. 2, p. 92.

See also supra VI, H, 5.

In General.

If a carrier accepts an interstate shipment without making an express contract for transportation, it becomes the initial carrier for the entire route, notwithstanding any subsequent contract between the shipper and an intermediate carrier. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. 1246, 38 Sup. Ct. Rep. 582.

4. Liability for Acts of Succeeding Carriers.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 48-52, No. 2, pp. 92-94, and Vol. II, p. 49.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 48, No. 3, p. 92, and Vol. II, p. 49.

Liability in General.

Under the Carmack Amendment an initial carrier is liable to a shipper of interstate freight for losses, damage, or injuries caused by the subsequent carriers. Barnet v. New York Central & Hudson R. R. Co., 122 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

An initial carrier is liable under the Carmack Amendment for an injury to or the loss of a shipment while in the possession of a connecting carrier by whatever cause occasioned, except the act of God or the public enemy. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co., — Vt. —, 102 Atl. 940.

The liability imposed on an initial carrier by the Carmack Amendment is for its own default, or the default of any subsequent carrier, in their common-law duties. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. 1246, 38 Sup. Ct. Rep. 582.

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When a shipper sues both an initial and a connecting carrier at common law for injuries to an interstate shipment, and the action is dismissed as to the latter carrier, a judgment cannot be rendered under the Carmack Amendment against the initial carrier for the negligence of the other, where a cause of action against the initial carrier as such is not pleaded. Norfolk & Wsetern R. Co. v. Dresbach, 28 Ohio C. App. 471.

Failure to Deliver.

The failure of a terminal carrier to make any effort to deliver an interstate express shipment until two months and ten days after its arrival at destination, authorizes a finding of a reckless and wanton disregard of the rights of the consignor sufficient to permit the imposition of punitive damages in an action against the initial carrier for the delay. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

Act of God.

The Carmack Amendment does not change the common-law rule as to the

effect of an act of God in excusing a carrier for the loss of an interstate shipment. Barnet v. New York Central & Hudson R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

In an action for the loss of an interstate shipment a state court is bound, irrespective of the state laws, by the rule of the Federal courts that when a carrier shows that the loss of an interstate shipment was occasioned by an act of God, the plaintiff must, in order to hold the carrier liable, show that its negligence directly contributed to the injury, such rule being one of substance and not of procedure. Barnet v. New York Central R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

Destruction of Goods by Fire.

A carrier is not liable for the loss of an interstate shipment by fire communicated to a car in a railway yard as the result of lime in another car becoming ignited from the waters of an unexpected and unprecedented flood, since any negligence of the carrier in placing the car containing the shipment in proximity to the car of lime, or in regard to delay in moving the shipment, was not the proximate cause of the loss. Barnet v. New York Central & Hudson R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

An initial carrier is liable under the Carmack Amendment for the destruction of an interstate shipment by fire not caused by the negligence of the connecting carrier but which was communicated from property adjoining a side track on which the shipment was stored nine miles from destination; since it was not essential to the liability of the defendant that the loss should have been caused by some affirmative act of the connecting carrier. Yazoo & Mississippi Valley R. Co. v. Craig, — Miss. —, 79 So. 102, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 11.

In an action against an initial carrier under the Carmack Amendment for the destruction by fire of a shipment while being held by a connecting carrier nine miles from destination, the nonliability of the defendant is not shown under a provision of the bill of lading exempting the carriers from liability for losses caused by "accidents or delays from unavoidable causes," by a plea that the delay in question was caused by an unusual and unexpected congestion of freight at destination in consequence of the inability of teamsters to handle accumulated freight, where it was not alleged that the shipment could not have been moved to destination and stored until such congestion abated. Yazoo & Mississippi Valley R. Co. v. Craig, — Miss. —, 79 So. 102, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 11.

An initial carrier is liable under the Carmack Amendment for the destruction of an interstate shipment by fire while in the hands of the delivering carrier after the expiration of the free time, where the bill of lading provides that during such time the liability of the carriers shall be that of warehousemen only. Briggs Hardware Co. v. Aroostock Valley R. Co., — Me. —, 104 Atl. 8.

An initial carrier is not liable under the Carmack Amendment where an interstate shipment was destroyed while in the custody of the terminal carrier by a fire originating either from the heating apparatus in a car, or from a stove placed therein without the knowledge of such carrier. Briggs Hardware Co. v. Aroostock Valley R. Co., — Me. —, 104 Atl. 8.

Failure to Give Notice of Nondelivery.

An initial carrier is not liable under the Carmack Amendment for the failure of a terminal carrier to notify a shipper of the refusal of the consignee to accept an interstate shipment. Markowitz v. New York Cent. R. Co., 172 N. Y. Supp. 233.

Upon the refusal of a consignee of an interstate shipment it is the duty of the carrier to notify the shipper and to hold the goods subject to the latter's orders; and the mere fact that the consignee, upon rejecting the shipment, might have given verbal directions for its return to the consignor, will not alter the rule, or amount to a ratification by the consignee of the terms of the bill of lading. Cincinnati, New Orleans & Texas Pac. R. Co. v. Malsby Co., — Ga. App. —, 96 S. E. 710.

Violation of Shipping Instructions.

An initial carrier is liable under the Carmack Amendment where, by reason of the volation of shipping instructions by subsequent carriers, an interstate shipment of potatoes is damaged in transit. First Nat. Bank of Allegan v. Grand Rapids & Indiana R. Co., 195 Mich. 1, 161 N. W. 859.

(c) Delay in Transit.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 49, No. 3, p. 93, and Vol. II, p. 49.

See also supra, VIII, B.

In General.

A carrier is answerable for negligently delaying the transportation of an interstate shipment. Wooster v. Chicago & Northwestern R. Co., — Wis. —, 166 N. W. 431.

Under the Carmack Amendment an initial carrier is liable for injury, due to an unreasonable delay in transporting an

interstate shipment. Chesney v. Union Pac. R. Co., 209 Ill. App. 494.

A carrier is liable under the Carmack Amendment for an unexplained delay of about twenty-one hours in transporting live stock a distance of 138 miles, which caused a shrinkage in weight and the loss of an early market. Erickson v. Chicago, Milwaukee & St. Paul R. Co., — S. Dak. —, 170 N. W. 144.

(g) Wrongful Delivery.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 51, and Vol. II, p. 50.

In General.

A carrier which contracts to deliver an interstate shipment at a specified point is answerable to the shipper for expenses incurred where the shipment was delivered by the last carrier at a place seven miles from that designated in the contract. Wooster v. Chicago & Northwestern R. Co., — Wis. —, 166 N. W. 431.

Failure to Require Production of "Order Bill of Lading."

An initial carrier is answerable under the Carmack Amendment for the wrongful delivery by a terminal carrier of an interstate shipment without requiring the production and surrender of an "order bill of lading." First Nat. Bank of Allegan v. Grand Rapids & Indiana R. Co., 195 Mich. 1, 161 N. W. 859.

Under the Carmack Amendment an initial carrier is liable to the consignor for the wrongful delivery by the terminal carrier of an interstate shipment without the production of an "order bill of lading." Babbitt v. Grand Trunk Western R. Co., — Ill. —, 120 N. E. 803.

An initial carrier is liable to a shipper under the Carmack Amendment for the delivery of an interstate shipment by the terminal carrier without the production of an "order bill of lading." King v. Barbarin, — C. C. A. —, 249 Fed. 303.

The owner may recover under the Carmack Amendment for the delivery by a terminal carrier of an interstate shipment without the production of an "order bill of lading," although a person other than the plaintiff was named therein as consignee, where the bill recited that the goods were received from the owner. King v. Barbarin, — C. C. A. —, 249 Fed. 303.

M. Liability of Connecting and Terminal Carriers.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 54-57, No. 3, pp. 94-95, No. 4, p. 36, and Vol. II, p. 51.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 94, No. 3, p. 95, No. 4, p. 36, and Vol. II, p. 51.

For Negligence of Preceding Carrier.

Where a horse is injured during interstate transportation by the failure of both the initial and the terminal carrier to properly water the animal, being a joint tort, the last carrier is liable under the Carmack Amendment for the whole damage. Bassett v. Chicago & Northwestern R. Co., — Wis. —, 169 N. W. 553.

Agreement to Pay for Losses Caused by Other Carriers.

An agreement by a terminal carrier to pay for damages to an interstate shipment caused by a preceding carrier is void and unenforceable when the bill of lading declares that no carrier shall be liable for loss or damage which does not occur on its own line or portion of the route. Southern R. Co. v. Lewis & Adcock Co., — Tenn. —, 201 S. W. 131.

2. For Own Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 54-55, No. 3, p. 95, No. 4, p. 36, and Vol. II, p. 52.

In General.

A common-law action against the last of several connecting carriers for an injury caused by its negligence to an interstate shipment, is not prohibited by the Carmack Amendment. Southern R. Co. v. Morris, — Ga. —, 95 S. E. 284, reversing 19 Ga. App. 878, 91 S. E. 878, S. C. — Ga. App. —, 95 S. E. 741.

In an action against a carrier other than the initial one, for injury to an interstate shipment, it must be alleged that the loss was caused by the negligence of the defendant in the action. Southern R. Co. v. Morris, — Ga. —, 95 S. E. 284, reversing 19 Ga. App. 878, 91 S. E. 878, S. C. — Ga. App. —, 95 S. E. 741.

Every carrier connected with an interstate shipment is liable for its own negligence. Gallagher v. Grand Trunk Western R. Co., 207 Ill. App. 316.

A terminal carrier is liable in action for breach of contract and not in tort, for failing to properly transport and deliver an interstate shipment, since the contract of the initial carrier is that of all connecting carriers. Gallagher v. Grand Trunk Western R. Co., 207 Ill. App. 316.

3. Liability on Own Contracts With Shipper.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 55-57, No. 3, p. 95, and Vol. II, p. 53.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 95, and Vol. II, p. 53.

Validity of New Bill of Lading.

Where an intermediate carrier takes up the original bill of lading issued by an initial carrier for an interstate shipment, and issues a new one for the remainder of the route, it is void, and the original contract is controlling. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519 62 L. ed. 1246, 38 Sup. Ct. Rep. 582.

A new bill of lading issued by a connecting carrier for the remaining portion of the route of an interstate shipment is valid where the contract made by the initial carrier is void for some reason. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519 62 L. ed. 1246, 38 Sup. Ct. Rep. 582.

Ordinarily the rights and liabilities of all the parties to an interstate shipping contract are controlled solely by the original contract, and connecting carriers cannot change such rights and liabilities by delivering to the shipper new bills of lading. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S. W. 638.

(c) As Initial Carrier.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 56, and No. 3, p. 95.

On Own Bills of Lading.

An intermediate carrier which takes up the original contract of carriage issued by an initial carrier for an interstate shipment, and issues a new one for the remainder of the journey, is not liable thereon under the Federal laws as an initial carrier for the negligence of succeeding carriers, since such contract is void, and the rights of the parties is governed exclusively by the original contract. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

Where an initial carrier issued a contract to transport live stock in interstate commerce on an order bill of lading to a point east of Chicago, at which place a connecting carrier refused to accept the shipment because the tariff regulations forbid the transportation of live stock in eastern territory on such bills of lading, and the shipper surrendered the same and the intermediate carrier issued a new contract of affrightment, since the original contract was void, such carrier became liable as the initial carrier under the Carmack Amendment, for the negligence of subsequent carriers. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

Where horses were sold en route at various points on the line of an initial carrier so that the cars were not full on arrival of the end of its line, the original bill of lading being there surrendered to the connecting carrier, who issued a new one for the remainder of the interstate journey, the horses being transferred to other cars and the empty space being filled with new animals purchased by the shipper, such connecting carrier became liable under the Carmack Amendment as the initial carrier, where the shipper does not obtain any advantage in rates under the new contract, and the circumstances do not show that the transaction was a subterfuge to evade the law. Louisville & Nashville R. Co. v. Johnson, — Ky. —, 206 S .W. 638.

4. Right to Benefit of Conditions in Favor of Initial Carrier.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 56, and Vol. II, p. 54.

Estoppel.

A terminal carrier cannot estop itself by conduct from relying on a provision of an interstate bill of lading that it should not be liable for loss or injury which did not occur on its own line or portion of the route. Southern R. Co. v. Lewis & Adcock Co., — Tenn. —, 201 S. W. 131.

N. Joint Liability of Initial and Succeeding Carriers.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 57.

(No new decisions.)

O. Liability Over of Negligent Carrier to Initial Carrier.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 58, No. 3, p. 95, and Vol. II, p. 54.

When Party to Original Action.

When a negligent connecting carrier is joined with the initial carrier as defendant in an action under the Carmack Amendment, the latter may, by cross-petition, recover over against the former

for such amount of damages as is evidenced by the judgment against the first carrier. St. Louis & San Francisco R. Co. v. First Nat. Bank of Elk City, — Okla. —, 171 Pac. 467.

Necessity for Payment of Judgment by Initial Carrier.

The actual payment of the judgment against an initial carrier rendered in an action under the Carmack Amendment, is not a condition to a recovery over by it against the negligent connecting carrier. St. Louis & San Francisco R. Co. v. First Nat. Bank of Elk City, — Okla. —, 171 Pac. 467.

XII. CUMMINS AMENDMENT.*

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 58, No. 3, p. 95, and Vol. II, p. 55.

In General.

Where the plaintiff, in an action governed by the Carmack Amendment as altered by the Cummins Amendment, bottoms his case on the negligence of a carrier and not on its common-law liability as an insurer, he must prove his case as pleaded. Robinson v. Bush, — Mo. App. —, 200 S. W. 757; Crow v. Bush, — Mo. App. —, 200 S. W. 762.

Limitation of Liability.
—In General.

The Cummins Amendment forbids a written limitation of a carrier's liability for an interstate shipment except when the goods are hidden from view and the carrier is not informed of their character. Thompson v. Great Northern R. Co., — Idaho, —, 174 Pac. 607.

— For Negligence.

A stipulation in a bill of lading that an interstate shipment of vegetables is at the owner's risk of freezing is void under the Cummins Amendment, since an attempt to relieve the carrier from liability for its own negligence. Bivens Bros. v. Atlantic Coast Line R. Co., — N. C. —, 97 S. E. 215.

—When Goods Concealed from View.

Before a shipper can be required to state in writing the value of an interstate shipment, and before the carrier can rely on such statement, if made, as a limitation of its liability, the Cummins Amendment requires that the property be hidden from view and that the carrier shall not be aware of its character. Thompson v. Great Northern R. Co., — Idaho, —, 174 Pac. 607.

When a carrier is informed that an interstate shipment consists of household goods, although concealed by boxing, and that the shipper's agent is not aware of their value, the Cummins Amendment precludes a written limitation of the carrier's liability. Thompson v. Great Northern R. Co., —Idaho, —, 174 Pac. 607.

Where a shipper informs a carrier that an interstate shipment consists of household goods, although boxed so as to be hidden from view, the Cummins Amendment invalidates a condition of the bill of lading limiting the carrier's liability to $10 per hundredweight, and for the loss of the goods the owner may recover their full value. Thompson v. Great Northern R. Co., — Idaho, —, 174 Pac. 607.

Where rugs were shipped in interstate commerce in boxes and bales under a declaration that each rug did not exceed a specified value, the shipper thereby obtaining a reduced freight rate, under the terms of the Cummins Amendment the words "character of the goods" when concealed from view, relate primarily to pecuniary value. Haddad v. Southern Pac. Co., — App. Div. —, 173 N. Y. Supp. 256.

—Value at Particular Time and Place.

Under the Cummins Amendment a condition of a bill of lading for an interstate shipment of grain that the carrier's liability for loss or damage should be the value of the property at the time and place of shipment, is unlawful and void as an attempt to limit the liability of the carrier. McCaull-Dinsmore Co. v. Chicago, Milwaukee & St. Paul R. Co., 252 Fed. 664.

A carrier is liable under the Cummins Amendment for the value of an interstate shipment of grain at destination at the time it should have been delivered, notwithstanding the bill of lading provides, in accordance with the tariff filed with and approved by the Interstate Commerce Commission, that any loss or damage should be computed on the value of the property at the time and place of shipment. McCaull-Dinsmore Co. v. Chicago, Milwaukee & St. Paul R. Co., 252 Fed. 664.

—Accepting Limited Liability Contract.

Where an interstate shipper fills out and signs an express receipt which does not state, nor is the carrier informed of, the character or value of the goods, which are concealed from view by boxing or wrapping, the shipper is bound by a limitation of the carrier's liability in the receipt. Tribble v. Southern Express Co., — S. C. —, 96 S. E. 712.

When an interstate express shipment is concealed from view by wrapping, boxing or othewise, and a carrier is not informed as to its character or value, the shipper accepting a receipt limiting the former's

*For text of Cummins Amendment see Federal Ry. Digest, Vol. I, No. 2, p. 395.

liability to $50 and obtaining a corresponding rate, under the Cummins Amendment the carrier's liability for the loss of the shipment is limited to that amount. Tribble v. Southern Express Co., — S. C. —, 96 S. E. 712.

Notice of Damage Claims.
—When Unnecessary.

United States Comp. Stat. 1916, §8604a, provides that notice of filing damage claims shall not be a condition precedent to a carrier's liability when loss or injury is due to delay or carelessness or negligence in transit, or in loading or unloading. VanLindley Nursery Co. v. Southern R. Co., —S. C.—, 96 S. E. 221.

The Cummins Amendment relieves a shipper from the necessity of giving written notice of loss for an injury to an interstate shipment by delay in transit, notwithstanding a condition of the bill of lading requiring such notice as a condition precedent to the carrier's liabilitly. Conover v. Wabash R. Co., 208 Ill. App. 105.

When an injury to an interstate shipment is the result of negligence on the part of a carrier, by the express terms of the Cummins Amendment the carrier is deprived of any defense which might arise from the failure of the plaintiff to give notice of his claim. Mann v. Fairfield & Elizabeth City Transp. Co., — N. C. —, 96 S. E. 731.

Under section 1 of the Cummins Amendment a shipper is not required to give a carrier notice of damages or of a claim for damages to an interstate shipment of horses resulting from the carrier unnecessarily and carelessly holding the animals for eight days in a railway yard at an intermediate point without proper shelter and care, or proper facilities therefor. Hailey v. Oregon Short Line R. Co., 253 Fed. 569.

The phrase "in transit," as used in section 1 of the Cummins Amendment relieving shippers from necessity of giving notice of damages or claims for damages for injuries due to delay or damage "in transit by carelessness or negligence" of the carrier, extends to all injuries occurring from such causes while an interstate shipment is in course of delivery from the place of origin to destination, and is not restricted to injuries occurring while the shipment is actually moving on its journey. Hailey v. Oregon Short Line R. Co., 253 Fed. 569.

XIII. ACTIONS.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 59-74, No. 3, pp. 96-127, No. 4, pp. 37-39, and Vol. II, pp. 56-66.

Orders of Director General of Railroads respecting venue of actions, see Government Operation of Railways.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 59, No. 3, p. 96, and No. 4, p. 37.

Venue.
—Carrier Under Federal Control.

Under orders 18 and 18A, made by the Director General of Railroads April 8th and 18th, 1918 (see Federal Ry. Digest, Vol. III, p. 131), an action against a carrier under Government control must be brought in the district or county wherein the cause of action accrued, or in which the plaintiff resided at that time. Wainright v. Pennsylvania R. Co., 253 Fed. 459.

Limitation of Actions.
—State Laws.

The statute of limitations of the particular state must govern a carrier's action to recover interstate freight charges, since there is no Federal law prescribing a limitation. Cincinnati, New Orleans & Texas Pac. R. Co. v. Malsby Co., — Ga. App. —, 96 S. E. 710.

An action brought in a Federal court by a carrier to recover interstate freight charges from a consignor is based on the bill of lading, and is governed by section 337 of the California Code of Civ. Procedure requiring actions upon contracts, obligations, or liabilities on instruments in writing executed within the state to be commenced within four years, rather than by sections 338 or 339. New York Cent. R. Co. v. Mutual Orange Distributors, — C. C. A. —, 251 Fed. 230.

A carrier's action to recover interstate freight charges is not governed by a statute of limitations pertaining to actions under statutory rights, since the liability of the shipper or consignee arises by virtue of an express or implied promise to pay and not merely by operation of law. Cincinnati, New Orleans & Texas Pac. R. Co. v. Malsby Co., — Ga. App. —, 96 S. E. 710.

While a bill of lading for an interstate shipment is a "contract in writing" within the meaning of section 4361 of the Ga. Civ. Code, and as such is binding on shipper and consignee when the latter ratifies the provisions by taking possession of the shipment; when an action against the consignee for freight, storage and demurrage charges is not commenced until four years after the latter's refusal of the shipment the action is barred under section 4362 of such code. Cincinnati, New Orleans &

Texas Pac. R. Co. v. Malsby Co., — Ga. App. —, 96 S. E. 710.

Removal of Causes.

Since an action for injuries to an interstate freight shipment arises under the Constitution and laws of the United States, it is, under sections 24 and 28 of the Judicial Code, removable from a state to a Federal court. Hartford Fire Ins. Co. v. Kansas City, Mexico & Orient R. Co., 251 Fed. 332.

A petition alleging an injury to an interstate shipment of freight states a cause of action under the Federal laws, for the purpose of removal from a state to a Federal court, notwithstanding that no such law is specifically referred to. Hartford Fire Ins. Co. v. Kansas City, Mexico & Orient R. Co., 251 Fed. 332.

B. Jurisdiction.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 59-60, No. 3, pp. 98-108, No. 4, p. 37, and Vol. II, p. 57.

2. Federal Courts.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 59-60, No. 3, pp. 98-101, No. 4, p. 37, and Vol. II, p. 57.

In General.

An action by a carrier against a consignee for the recovery of tariff charges for disinfecting cattle cars used for interstate transportation, will lie in a Federal District Court under section 24 of the Judicial Code, notwithstanding the defense that the consignee paid all the charges demanded by the carrier, except that for disinfecting, that he received the consignment as a factor or commission merchant, and had sold the same and remitted the proceeds, less the expenses, to the consignor. Louisville & Nashville R. Co. v. Rice, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 429.

A claim by a railway company based upon a provision of a tariff duly filed, published and approved as required by the Act Regulating Commerce necessarily depends upon a construction and effect of that act so as to give a Federal District Court jurisdiction under section 24 of the Judicial Code providing that such courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." Louisville & Nashville R. Co. v. Rice, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 429.

Since an action by a connecting carrier against a consignor to recover freight charges on an interstate shipment, where the bill of lading makes the latter or the consignee liable therefor, is governed by the Carmack Amendment, under section 24 of the Judicial Code, a Federal court has original jurisdiction of the action, irrespective of the amount involved. New York Cent. R. Co. v. Mutual Orange Distributors, — C. C. A. —, 251 Fed. 230.

3. Interstate Commerce Commission.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 60, No. 3, p. 102, and Vol. II, p. 57.

In General.

The construction of a demurrage rule relating to interstate shipments is within the exclusive jurisdiction of the Interstate Commerce Commission. Cleveland & Western Coal Co. v. Pennsylvania Co., — Ohio, —, 119 N. E. 361.

4. State Courts.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, p. 60, No. 3, pp. 102-108, and Vol. II, p. 57.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 60, No. 3, p. 102, No. 4, p. 37, and Vol. II, p. 58.

Subjects Within Jurisdiction of Interstate Commerce Act.

A state court cannot, as an original question, exert authority over subjects which come primarily within the jurisdiction of the Interstate Commerce Commission. Cleveland & Western Coal Co. v. Pennsylvania Co., — Ohio, —, 119 N. E. 361.

Without preliminary action by the Interstate Commerce Commission, a state court does not have jurisdiction of an action by a shipper to recover from an interstate carrier sums expended by the former in lining and coopering cars used for interstate bulk grain shipments, when the applicable tariff makes no allowances for such services Midway Co-Op. Elevator Co. v. Great Northern R. Co., — N. Dak. —, 169 N. W. 494.

A state court cannot, in advance of a determination by the Interstate Commerce Commission, entertain an action by a shipper to recover alleged overcharges resulting from routing an intrastate shipment by a longer interstate route than by a shorter intrastate one. Northern Pac. R. Co. v. Solum, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 550, S. C. below 133 Minn. 93, 461, 157 N. W. 996, 998, 136 Minn. 468, 162 N. W. 1087.

Failure to Make Delivery.

A state court has jurisdiction of an action against an interstate carrier for the

breach of a contract of affreightment by failing to deliver an interstate shipment at the destination specified in the contract. Wooster v. Chicago & Northwestern R. Co., — Wis. —, 166 N. W. 431.

Demurrage Rules.

A state court cannot construe a demurrage rule with respect to interstate traffic, since a question within the exclusive jurisdiction of the Interstate Commerce Commission. Cleveland & Western Coal Co. v. Pennsylvania Co., — Ohio, —, 119 N. E. 361.

C. Process.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 61.

(No new decisions.)

D. Parties.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 61-62, and No. 3, p. 108.

Director General of Railroads as necessary party to actions, see Government Operation of Railways.

2. Plaintiffs.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 61, and No. 3, p. 108.

Substitution.

In an action by a corporation under the Carmack Amendment against an initial carrier, there cannot, under the practice prevailing in Virginia, be substituted as plaintiffs persons who are the lawful holders of the bill of lading, notwithstanding that they also own most of the stock of such corporation. Norfolk Southern R. Co. v. Greenwich Corporation, — Va. —, 95 S. E. 389.

Indorsee of "Order Bill of Lading."

A bank to whom is indorsed an "order bill of lading," with draft attached, for an interstate shipment, and who places the amount of the draft to the credit of the shipper, who checks it out, is the holder of the paper in due course, and may maintain an action against the initial carrier for the wrongful delivery of the shipment by the terminal carrier without requiring the production and surrender of the bill of lading. First Nat. Bank of Allegan v. Grand Rapids & Indiana R. Co., 195 Mich. 1, 161 N. W. 859.

Misjoinder.

— Saving Statute.

Where an action against a carrier for loss of an interstate shipment was dismissed because brought in the name of one partner only, a new action in the partnership name is not a continuation of the first action within a state statute permitting the commencement of a new suit within six months after the failure of any action for any cause except negligence in prosecution. Marks & Shields v. Chicago, Rock Island & Pac. R. Co., — Iowa, —, 169 N. W. 764.

3. Defendants.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 108.

Joinder.

—Initial and Connecting Carriers.

A connecting carrier is neither a necessary nor a proper party to an action under the Carmack Amendment against an initial carrier, and if joined the petition is subject to special demurrer for misjoinder. Norfolk & Western R. Co. v. Dresbach, 28 Ohio C. App. 471.

E. Pleading.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 62-63, No. 3, pp. 108-111, No. 4, p. 38, and Vol. II, p. 59.

Plea or Answer.

When a carrier pleads the establishment of a live stock quarantine by the Secretary of Agriculture as a defense to an action for the abandonment of a contract for the interstate transportation of cattle, facts should be pleaded showing that the order was coercive in character and one which the carrier was required to obey. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268

An allegation of the defendant's answer in an action against a carrier for failure to transport an interstate shipment of live stock, that it was prevented from doing so by a quarantine established by the Secretary of Agriculture, does not set up a defense, where the answer does not allege facts showing the promulgation of the order of quarantine in the manner required by the Federal laws. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

In an action for injuries to an interstate shipment in transit caused by a carrier's negligence, that portion of the defendant's answer setting up the failure of the plaintiff to give notice of his claim within 90 days, as required by the Cummins Amendment and the terms of the bill of lading, is, under section 1 of such act, redundant and immaterial. Hailey v. Oregon Short Line R. Co., 253 Fed. 569.

F. Damages.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 63-64, No. 3, pp. 111-113, No. 4, p. 38, and Vol. II, p. 60.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 111, No. 4, p. 38, and Vol. II, p. 60.

Measure of Damages in General.

A recovery of $110.75 for the loss of an interstate shipment weighing 270 pounds is permissible under an express receipt limiting the liability of the carrier to $50, or, if the shipment weighs more than 100 pounds, to a sum not exceeding 50c per hundred weight. Berlinsky v. Barrett, — Appt. Term —, 173 N. Y. Supp. 449.

Interest.

In an action under the Carmack Amendment aganist an initial carrier the plaintiff may recover as damages a sum equal to simple interest at the lawful rate from the time of arrival of a shipment at destination in a damaged condition, to the time of the setting of the trial, rather than from the time written notice of damage claim was filed with the carrier. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co., — Vt. —, 102 Atl. 940.

Wrongful Delivery.

The measure of damages in an action under the Carmack Amendment against an initial carrier for the wrongful delivery of an interstate shipment by a terminal carrier without requiring the production and surrender of an "order bill of lading," is the market value of the consignment. First Nat. Bank of Allegan v. Grand Rapids & Indiana R. Co., 195 Mich. 1, 161 N. W. 859.

Failure to Follow Shipping Instructions.

In an action against an initial carrier for injury to an interstate shipment of potatoes by the failure of the connecting carriers to follow the instructions of the shipper regarding the ventilation of the car, the measure of damages is the difference between the actual value of the shipment on arrival at destination and its value had it arrived in good condition. First Nat. Bank of Allegan v. Grand Rapids & Indiana R. Co., 195 Mich. 1, 161 N. W. 859.

Failure to Complete Transportation.

When a carrier fails to complete the interstate transportation of live stock because of a Federal quarantine, and returns the cattle to the shipper at place of consignment, the latter having informed the carrier before it accepted the shipment, that the cattle were purchased for feeding on the shipper's farm where there was abundant pasturage, the shipper may recover for the carrier's breach of the contract of carriage, the difference between the reasonable and necessary expenses incurred in feeding the stock at the place of shipment, and the reasonable value of the pasturage which the cattle would have consumed on such farm, plus the reasonable expenses of caring for them. Louisville & Nashville R. Co. v. Murphy, — Ky. —, 206 S. W. 268.

2. Delays.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 63, and No. 3, p. 111.

In General.

The measure of damages for deterioration of corn in consequence of an unusual delay in interstate transit, is the difference in the market value between the condition in which the corn should have arrived but for the negligence of the carrier, and the market value of the same in the condition in which, by reason of the negligence of the carrier, it did arrive at destination. Conover v. Wabash R. Co., 208 Ill. App. 105.

Punitive Damages.

Punitive damages may be awarded in an action under the Carmack Amendment against an initial carrier for a reckless and wanton failure of a connection carrier to make prompt delivery of a shipment. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

Reasonableness.

A verdict for $490 is excessive for a willful and wanton delay in the delivery of a coil and magneto, in consequence of which the plaintiff was deprived of the use of his automobile for over two months, and a new trial was ordered unless the judgment was remitted down to $250. Southern Express Co. v. Malone, — Ala. App. —, 78 So. 408.

5. Injury to Live Stock.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 64, No. 3, p. 112, and Vol. II, p. 60.

In General.

The measure of recovery for injuries to horses shipped in interstate commerce under a uniform live stock contract, must be at the ratio of the stipulated value of

each animal to its real value. Dickerson v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 5.

Reasonableness.

A verdict for $150 is not excessive damages for the shrinkage in 47 head of cattle in consequence of the negligence of a carrier in keeping some of them for about a day in a car and others in a stock pen which did not have facilities for feeding and watering the animals. Chicago, Rock Island & Pacific R. Co. v. Stallings, — Ark. —, 201 S. W. 294.

G. Evidence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 64-69, No. 3, pp. 113-117, No. 4, p. 38, and Vol. II, p. 61.

4. Presumptions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 65, No. 3, p. 113, No. 4, p. 38, and Vol. II, p. 61.

In General.

The presumption is that a bill of lading issued for an interstate shipment has been duly filed with the Interstate Commerce Commission. Southern R. Co. v. Lewis & Adcock Co., — Tenn. —, 201 S. W. 131.

Since the Act Regulating Commerce requires a written bill of lading for an interstate shipment the consignee will be presumed to know such fact, but not the terms of the bill. New York Central & H. R. R. Co. v. York, — Mass. —, 119 N. E. 855.

In an action by a carrier to recover from a consignee the unpaid balance due for freight charges, where it is admitted that a schedule of rates has been duly filed with and approved by the Interstate Commerce Commission, the presumption, in the absence of any showing to the contrary, is that the rates were duly published, and not that the carrier violated the provisions of the Elkins Act, subjecting him to severe fines and penalties for failure to publish such rates. Atchison, Topeka & Santa Fe R. Co. v. Wagner, — Kan. —, 172 Pac. 519.

It must be presumed that an interstate carrier is conducting its business in accordance with the terms of the Act Regulating Commerce, Tribble v. Southern Express Co., — S. C. —, 96 S. E. 712.

In the absence of evidence to the contrary it will be presumed from the certificate of the Secretary of the Interstate Commerce Commission that the tariffs of a carrier were legally in effect. Tribble v. Southern Express Co., — S. C. —, 96 S. E. 712.

Presumption of Negligence.

The presumption of negligence on the part of a carrier arising from a showing of the sound condition of property at the time of making an interstate shipment and of the injured and damaged condition of the goods at destination, does not apply where, under the contract of shipment, the shipper or his agent accompanies the property for the purpose of taking care of the same in transit, when the cause of injury is not shown to be a matter outside the duties and obligations of the caretaker, or in respect to a matter of which his presence does not relieve the carrier from the obligation imposed on it by law. Zimmerman v. Northern Pac. R. Co., —Minn. —, 167 N. W. 546.

A bill of lading issued by an initial carrier for the interstate transportation of freight reciting its apparent good order, is, in an action against the terminal carrier for its own negligence, prima facie evidence of the condition of the goods when received by the first carrier. Gallagher v. Grand Trunk Western R. Co., 207 Ill. App. 316.

5. Burden of Proof.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 66, No. 3, p. 114, and Vol. II, p. 62.

Negligence of Carrier.

The burden is on the plaintiff to establish the negligence of the defendant as alleged in an action governed by the Carmack Amendment, as altered by the Cummins Amendment, where negligence instead of a breach of the carrier's common-law duty as an insurer, is pleaded. Robinson v. Bush, — Mo. App.. —, 200 S. W. 757; Crow v. Bush, — Mo. App. —, 200 S. W. 762.

The burden is on the plaintiff, in an action for injuries to an interstate shipment, to show the negligence of the carrier, when made under a bill of lading relieving the carrier from liability for delay, injury to or loss of animals from any cause whatever except the negligence of the agents or employees of the carrier. Wallis v. Adams Express Co., 19 Ohio, N. P. (N. S.) 156.

The burden rests on a shipper to prove the negligence of a carrier where an interstate shipment is injured when accompanied by the shipper or his agent as a caretaker, unless due to a cause outside the duties and obligations of the caretaker, or in respect to a matter of which his presence does not relieve the carrier from the obligation imposed on it by law, since the presumption arising from the delivery of property to the carrier in good condition and its receipt in a damaged condition at destination does not apply in such

a case. Zimmerman v. Northern Pac. R. Co., — Minn. —, 167 N. W. 546.

Exceptions of Contract of Affreightment.

In an action under the Carmack Amendment for injuries to an interstate shipment of live stock, the burden is on the carrier to prove that at the time of injury the special contract exceptions it relies on was in operation, and also that the injuries were of such a nature that they may, with equal probability, in accordance with the evidence, have been occasioned by causes which were within such contract exceptions, and this rule applies when the evidence shows that the injuries were due to human agencies. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

Act of God.

The burden of showing that the act of God or the public enemy caused injury to or the loss of an interstate shipment on the line of a connecting carrier, rests on the initial carrier when sued under the Carmack Amendment. Haglin-Stahr Co. v. Montpelier & Wells R. R. Co. — Vt. —, 102 Atl. 940.

The burden is on the plaintiff, in an action in a state court against a carrier for the loss of an interstate shipment which the carrier shows was caused by an act of God, to show, pursuant to the rules of the Federal courts, that the negligence of the carrier also directly contributed to the injury, such rule being one of substance rather than of procedure. Barnet v. New York Central & Hudson R. R. Co., 222 N. Y. 195, 118 N. E. 625, reversing 167 App. Div. 738, 158 N. Y. Supp. 374.

Notice of Damage Claims.

The burden is on a shipper to show the giving to a carrier of notice of a damage claim within the time required by the bill of lading as a condition precedent to the carrier's liability, when the giving of notice is in issue. Atchison, Topeka & Santa Fe R. Co. v. Cooper, — Okla. —, 176 Pac. 539.

Waiver of Notice of Damages.

The plaintiff in an action for the loss of interstate freight has the burden of showing the waiver by the defendant of the giving of notice of loss within the time prescribed by the contract of affreightment. Hamilton v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 270.

Freedom of Carrier From Negligence.

When the plaintiff shows the delivery of inanimate goods to a carrier for interstate transportation and their nondelivery, the defendant has the burden of proving that the loss was not due to its negligence, or to a cause for which it is responsible. Chesapeake & Ohio R. Co. v. Nat. Bank of Commerce, — Va. —, 95 S. E. 454, certiorari denied 247 U. S. 519, 62 L. ed. —, 38 Sup. Ct. Rep. 582.

The burden is on the defendant to show its freedom from negligence in an action against a carrier for injuries to an interstate shipment of vegetables from freezing, since it has the best opportunity of knowing and proving how the injury occurred. Bivens Bros. v. Atlantic Coast Line R. Co., — N. C. —, 97 S. E. 215.

7. Documentary Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 68.

Circular From Agricultural Department.

A circular issued by the Department of Agriculture relating to the amount of feed to be furnished live stock during each 24 hours in transit, is admissible in evidence in an action against a shipper by a carrier to recover the reasonable cost of feed furnished. Pennsylvania R. Co. v. Swift & Co., 248 Fed. 315.

11. Parol Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 117, and Vol. II, p. 62.

In General.

The admission of evidence of a parol agreement relating to an interstate shipment is not prejudicial in an action against a carrier for the breach of the contract, where the parol agreement was embodied in the written bill of lading. Sheldon v. Chicago, Burlington & Quincy R. Co., — Iowa, —, 169 N. W. 189.

That a shipment was interstate may be shown by parol evidence without producing the original way bills, in an action by a carrier to recover undercharges in freight rates. Northern Pac. R. Co. v. Longmire, — Wash. —, 176 Pac. 150.

H. Instructions.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 69-71, No. 3, pp. 117-120, No. 4, p. 38, and Vol. II, p. 63.

Damages.

It is error to instruct the jury that the measure of damages for an injury to an interstate shipment is the difference between the reasonable market value of the goods at destination and their reasonable value at that time and place in the damaged condition, where the bill of lading

stipulates that the loss or damage shall be computed on the value of the property at the time and place of shipment. Cudahy Packing Co. v. Bixby, — Mo. App. —, 205 S. W. 865, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 19.

I. Directing Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 71, and No. 3, p. 120.

(No new decisions.)

J. Questions of Law and Fact.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 72, No. 3, pp. 120-122, and Vol. II, p. 63.

Whether Shipment Interstate.

The question whether a shipment is interstate is for the jury when lumber intended for points outside a state, is transported by an intrastate narrow gauge railway company and delivered to the shipper within the state, where, although notations on the bills of lading show that the ultimate destination is interstate, the latter pays the carrier its charges and takes physical possession and control of the lumber, transfers it to standard gauge cars of another carrier and reships it to final interstate destination. Service v. Sumter Valley R. Co., — Ore. —, 171 Pac. 202.

Implied Agreement of Consignee to Pay Freight.

Where a commission merchant received an interstate shipment of fruit under a straight bill of lading, paying the charges demanded by the carrier, which were less than the tariff rate, the question whether he impliedly agreed to pay the lawful rate is for the jury. New York Central & H. R. R. Co. v. York, — Mass. —, 119 N. E. 855.

K. Costs, Interest and Attorney's Fees.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 122.

(No new decisions.)

L. Judgment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 73.

(No new decisions.)

M. Appeal and Error.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 73-74, No. 3, pp. 122-127, No. 4, p. 38, and Vol. II, p. 64.

Jurisdiction in General.

The construction of the Act Regulating Commerce is not involved in an action for less than $50 against a carrier for negligently selling an interstate ticket with improper stopover privilege, so as to be reviewable under a state law permitting it in such an action when the construction of a statute is involved. Ross v. Gallogly, — Ind. —, 120 N. E. 599.

Jurisdiction of Federal Supreme Court.

When a writ of error to a state court is not available to review in the Federal Supreme Court an action to recover alleged overcharges in freight rates, the appeal will be dismissed although the jurisdiction of the Federal court is not questioned by the defendant in error. Northern Pac. R. Co. v. Solum, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 550, S. C. below 133 Minn. 93, 461, 157 N. W. 996, 998, 136 Minn. 468, 162 N. W. 1087.

Since the passage of the Judicial Code of March 3, 1911, a shipper's action in a state court for alleged overcharges on intrastate shipments resulting from the routing thereof by a longer interstate rather than by the shorter intrastate line, is not reviewable by the Federal Supreme Court on writ. Northern Pac. R. Co. v. Solum, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 550, S. C. below 133 Minn. 93, 461, 157 N. W. 996, 998, 136 Minn. 468, 162 N. W. 1087.

When Federal Question Seasonably Raised.

The claim that an action is controlled by the Carmack Amendment comes too late to permit a writ of error to a state court, where for more than eight years the record contains no suggestion of a Federal question, during which the supreme court of the state passed twice on the case. Missouri, Kansas & Texas R. Co. v. Sealey, — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 97, dismissing writ of error to 98 Kan. 225, 158 Pac. 62.

Questions Not Raised Below.

The jurisdiction of a state court to entertain an action by a shipper to recover alleged overcharges resulting from the routing of intrastate shipments by a longer interstate route rather than by a shorter intrastate one, may be attacked in the Supreme Court of the United States although the question is raised for the first time in the state court of last resort and there overruled. Northern Pac. R. Co. v. Solum, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 550, S. C. below 133 Minn. 93, 461, 157 N. W. 996, 998, 136 Minn. 468, 162 N. W. 1087.

A ruling of the Interstate Commerce Commission pertaining to the waiver by carriers, in the interest of uniformity of

practice, of the provisions of the uniform bill of lading with respect to giving notice of damage claims within four months, will not be considered by an appellate court when not pleaded nor introduced in evidence on the trial, and when brought to the attention of the court for the first time by a citation in the brief of the appellee. Keeney v. Chicago, Burlington & Quincy R. Co., — Iowa —, 167 N. W. 475.

The provisions of the Act of Congress (U. S. Comp. St. 1916, §8604a) that when the loss, damage or injury to a shipment is due to delay, or to injury while being loaded or unloaded, or to carelessness or negligence while in transit, no notice of the filing of claims for damages shall be required as a condition precedent to a recovery against the carrier, may be invoked for the first time on appeal when the question of the necessity for written notice was raised at the trial. Van Lindley Nursery Co. v. Southern R. Co., — S. C. —, 96 S. E. 221.

Changing Theory on Appeal.

Where a shipper's action against an initial carrier is tried on the theory of a waiver by the latter of the former's noncompliance with a requirement of the shipping contract for giving written notice of loss or damage claims, the plaintiff cannot on appeal change his theory and insist that there was a sufficient compliance with such requirement. Cudahy Packing Co. v. Chicago & Northwestern R. Co., — Mo. App. —, 201 S. W. 596; same v. same, — Mo. App. —, 201 S. W. 598.

Penalty for Vexatious Appeal.

A penalty of 10% added by the supreme court to the plaintiff's judgment in an action against a carrier under the Carmack Amendment, where the latter was clearly liable to the plaintiff, and the failure to pay his claim was without justification. Erickson v. Chicago, Milwaukee & St. Paul R. Co., — S. Dak. —, 170 N. W. 144.

XIV. CRIMINAL PROSECUTIONS.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 39-45, and Vol. II, p. 66.

A. In General.

See same section Federal Ry. Digest, Vol. I, No. 4, p. 39.

(No new decisions.)

B. Jurisdiction.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 39, and Vol. II, p. 66.

(No new decisions.)

C. Limitations.

See same section Federal Ry. Digest, Vol. I, No. 4, p. 39.

(No new decisions.)

D. Parties.

See same section Federal Ry. Digest, Vol. I, No. 4, p. 40.

(No new decisions.)

E. Indictment.

See also same section Federal Ry. Digest, Vol I, No. 4, pp. 40-43.

Aiding Shipper to Obtain Illegal Rates.

The indictment of a carrier for violating Section 1 of the Act Regulating Commerce by assisting or suffering a shipper to obtain transportation at less than regular rates by means of false billing and classification, need not aver that the freight charges were paid or to be paid by him, since the contract of shipment being made with him, he is primarily liable for the charges. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

The indictment of a railway company for violating section 1 of the Act Regulating Commerce by assisting a shipper to obtain transportation at less than regular rates, need not set forth the steps required by law, such as publication and posting, to be followed in fixing a lawful rate. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

The way-bills for an interstate shipment need not be set out in an indictment of a railway company for violating section 1 of the Act Regulating Commerce by assisting or suffering a shipper to obtain transportation at less than regular rates by means of false billing and classifications. Elgin, Joliet & Eastern R. Co. v. United States, —C. C. A. —, 253 Fed. 907.

An indictment of a carrier for violating section 1 of the Act Regulating Commerce by assisting or suffering a shipper to obtain transportation at less than the regular rates, sufficiently sets forth the manner or means whereby the shipper obtained such transportation by charging the defendant with assisting or suffering and premitting him to obtain transportation at less than the lawful rate by means of false billing or classificaation, the shipments being dedescribed, car numbers given and the lawful rate and that actually charged being stated. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

The fact that the indictment of a carrier for violating section 1 of the Act Regulat-

ing Commerce by assisting or suffering a shipper to obtain transportation at less than regular rate by means of false billing and classification, charges that the rate departed from was on "paper, wood pulp and strawboard boxes, knocked down flat, in carload lots," while the shipments charged do not specify that the boxes were "knocked down" or were in carload lots, is an immaterial discrepancy. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

Imperfections in matters of form which in no manner prejudice the defendant in an indictment charging a carrier with violating section 1 of the Act Regulating Commerce, by assisting or suffering a shipper to obtain transportation at less than the regular rates by means of false billing or classification, are, after verdict, cured by section 1025 of R. S. U. S. (U. S. Comp. St. 1919, section 1691). Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

F. Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 43.

Aiding Shipper to Secure Illegal Rate.

The evidence, in a prosecution of a carrier for violating section 1 of the Act Regulating Commerce, by assisting or suffering a shipper to obtain transportation at less than the regular rates by means of false billing or classification, held to warrant the inference that the defendant is chargeable with the knowledge of its agents, officers and cation. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

G. Instructions.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 44.

In General.

An instruction, in an action against a carrier for violating section 1 of the Act Regulating Commerce by assisting or suffering a shipper to obtain transportation at less than regular rates by means of false billing and classification, to the effect that the defendant is chargeable with the knowledge of as its agents, officers and employees, as to the nature and character of the shipment, held not prejudicial to the defendant although there is no evidence of any such knowledge. Elgin, Joliet & Eastern R. Co. v. United States, — C. C. A. —, 253 Fed. 907.

H. Variance and Failure of Proof.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 44.

(No new decisions.)

I. Questions of Law and Fact.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 44.

(No new decisions.)

J. Verdict, Judgment and Penalties.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 44.

Penalty for failure to collect demurrage, see supra IV, F, 2, (a).

Penalty for Failure to Collect Demurrage. — Excessiveness.

A fine of $24,000 held not excessive for the failure of a carrier to collect $60 demurrage charges on interstate shipments, where an aggravated case of disregard of the law forbidding discrimination or giving of special concessions is shown. Michigan Central R. Co. v. United States, — C. C. A. —, 246 Fed. 353, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

K. Appeal and Error.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 45.

(No new decisions.)

EMPLOYERS' LIABILITY ACT. FEDERAL*

*For text of Act see No. 2, Vol. I, p. 395.

I. VALIDITY.

A. Act of 1906.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 83.

Application of Act of 1906 to carriers by water in territories, see infra III, B and V, E.

2. In District of Columbia and Territories.

Repeal by Act of 1908.

The Federal Employers' Liability Act of 1908 does not repeal the similar act of 1906 in so far as the latter act applies to carriers by water within the territories of the United States or the District of Columbia. Walsh v. Alaska Steamship Co., — Wash. —, 172 Pac. 269.

B. Act of 1908.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 84-86, No. 4, p. 46, and Vol. II, pp. 78, 79.

In General.

Congress, in the exercise of its power over interstate commerce, subject to the limitations prescribed in the Constitution, may regulate the relations of common carriers by railroad and their employees who have a substantial connection with interstate commerce, while both carrier and servant are engaged therein. Eskelsen v. Union Pac. R. Co., — Neb. —, 168 N. W. 366, denying rehearing to 167 N. W. 408.

II. NATURE AND CONSTRUCTION.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 86-87, No. 4, p. 46, and Vol. I, pp. 79, 80.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 46, and Vol. II, p. 79.

Purpose.

The Federal Employer's Liability Act establishes a rule intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive, and can neither be extended nor abridged by the common or statutory laws of a state. McLain v. Chicago, Great Western R. Co., — Minn. —, 167 N. W. 349.

B. Remedial Character.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 86.

(No new decisions.)

C. Liberal or Strict Construction.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 86, and Vol. II, p. 79.

In General.

Neither the rule of strict nor liberal construction is applicable in passing on the Federal Employers' Liability Act. Kinzell v. Chicago, Milwaukee & St. Paul R. Co., — Idaho, —, 171 Pac. 1136.

Discretionary Construction.

The court has no discretion in construing the Federal Employers' Liability Act, nor are the rules of strict or liberal construction applicable. Kinzell v. Chicago, Milwaukee & St. Paul R. Co., — Idaho, —, 171 Pac. 1136.

D. Construction of Words and Phrases.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 86, and Vol. II, p. 79.

"Negligence."

The term "negligence" as used in the Federal Employers' Liability Act, is to be interpreted in the light of the common law, as construed and applied by the Federal courts, free from state legislative interference. McLain v. Chicago Great Western R. C., — Minn. —, 167 N. W. 349.

"Contributory Negligence."

The words "contributory negligence" as used in the Federal Employers' Liability Act, are to be interpreted in the light of the common law as construed and applied by the Federal courts, free from state legislative interference. McLain v. Chicago Great Western R. Co., — Minn. —, 167 N. W. 349.

E. Construction by State Courts.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 87, and Vol. II, p. 79.

Following Federal Decisions.

The decisions of the Supreme Court of the United States construing the Federal Employers' Liability Act must be followed by a state court. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

A state court must accept the interpretation placed on the Federal Employers' Liability Act by the Supreme Court of the United States. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

In determining whether a given employment falls within the Federal Employer's Liability Act, a state court must look to the decisions of the Federal courts as of controlling force. Southern Pac. Co. v. Industrial Accident Commission, — Cal. —, 171 Pac. 1071.

In construing the Federal Employers' Liability Act, the decisions of the Supreme Court of the United States are binding on a state court. Polluck v. Minneapolis & St. Louis R. Co., — S. Dak. —, 166 N. W. 641, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

What Federal Courts Must Be Followed.

It is only the decisions of the Supreme Court of the United States, rather than those of the inferior Federal tribunals, which a state court is bound to follow in determining whether a railway company is a common carrier. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17.

III. OPERATION.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 87-88, No. 3, p. 129, No. 4, p. 46, and Vol. II, p. 80.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 87.

(No new decisions.)

B. Territorial Extent.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 87, and No. 4, p. 46.

Alaska.

The Federal Employers' Liability Act of 1906 is still operative in the territory of Alaska as to carriers by water although engaged in interstate commerce. Walsh v. Alaska Steamship Co., — Wash. —, 172 Pac. 269.

C. Exclusiveness of Remedy.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 87, No. 3, p. 129, and Vol. II, p. 80.

In General.

An action in a state court under the Federal Employers' Liability Act must be determined by the Federal law as interpreted by the court of last resort. Briggs v. Union Pac. R. Co., — Kan. —, 175 Pac. 105.

When applicable the Federal Employers' Liability Act supersedes and excludes every other remedy. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

The Federal Employers' Liability Act affords the exclusive and controlling rule of liability in cases falling within its terms; and all questions therein must be determined in accordance with the provisions of that act and the applicable and authoritative Federal decisions. Jones v. Norfolk Southern R. Co., — N. C. —, 79 S. E. 48.

An action under the Federal Employers' Liability Act must be determined under that law and the decisions of the Federal courts. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

The Federal Employers' Liability Act governs an action for injuries sustained by an engineer while moving a train engaged in interstate commerce. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323.

D. Effect on Particular Laws.

See also generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 88-90, No. 3, p. 129, No. 4, p. 46, and Vol. II, p. 80.

3. State Laws.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 89, No. 3, p. 129, No. 4, p. 46, and Vol. II, p. 80.

Application generally of state laws to actions under Federal Employers' liability Act, see infra XVI, D, 2, 3.

Effect of state laws saving rights of action, see infra XVI, C, 6.

Recovery under state or common law, see generally infra XVI.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 89, No. 3, p. 129, No. 4, p. 46, and Vol. II, p. 80.

Superseding Effect of Federal Act.

The Federal Employers' Liability Act superseded all state laws relating to the same subject. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389; Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

Since Congress has by the Federal Employers' Liability Act, taken possession of the whole field of employers' liability to employees in interstate transportation by rail, all state laws upon that subject are superseded. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

The Federal Employers' Liability Act supersedes rights of action under state laws for injuries sustained by railway employees while engaged in interstate commerce. Gaddy v. North Carolina R. Co., — N. C. —, 95 S. E. 925.

The Federal Employers' Liability Act governs an action for personal injuries to the exclusion of all state laws, where the declaration alleges that the injuries were sustained while the plaintiff was repairing an interstate railway track. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

(b) Workmen's Compensation Act.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 90, and Vol. II, p. 80.

Recovery under state workmen's compensation acts, see generally XVI, D. 2 (g).

E. Retroaction Effect.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 90.

(No new decisions.)

IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 91-94, No. 3, p. 129, No. 4, p. 46, and Vol. II, pp. 81, 82.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

Agreement to Assume Risk.

A notice read and signed by a lineman relating to the dangers from working about wires charged with electric currents of high voltage, which stated that he assumed the risks of injury therefrom, and that the employer was not liable for injuries caused by failing to observe such warning. is void under section five of the Federal Employers' Liability Act as an attempt to evade the responsibility thereby created. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

A permit given a telegraph operator employed in interstate commerce by an interstate railway company to use a speeder on the tracks of the company in going to and from his work, by which he agreed to assume all risks of injury while doing so, is within section 5 of the Federal Employers' Liability Act as a contract relieving the carrier from liability, and is therefore void. Cavanaugh v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 19 Ohio N. P. (N. S.) 169.

B. Contracts Antedating Federal Act.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

(No new decisions.)

C. Contracts Between Express Companies and Employees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

In General.

Since an express company which transports property over the lines of a railway company under a contract, is a common carrier by rail within the meaning of the Federal Employers' Liability Act, a contract between it and an express messenger relieving both companies from liability for injuries sustained by him, is void under section five of the act as a contract exempting the carrier from the liability thereby created. Taylor v. Wells Fargo & Co., — C. C. A. —, 249 Fed. 109, S. C. 136 C. C. A. 402, 220 Fed. 796.

D. Contracts Between Pullman Company and Employees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

(No new decisions.)

E. Contracts With Student Employees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

(No new decisions.)

F. Contracts With Independent Contractors.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

To Coal Engines and Clean Cinder Pit.

An appellate court declined to consider whether, under section 5 of the Federal Employers' Liability Act, a contract between an independent contractor and a railroad company to keep coal pockets filled, an ash pit clean, and to employ all necessary labor therefor, was intended as an evasion of the law to relieve the carrier from liability under such act for injuries sustained by those engaged in such work, where such question was not raised in the case. Polluck v. Minneapolis & St. Louis R. Co., — S. Dak. —, 166 N. W. 641, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

G. Relief Department Contracts.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91, No. 3, p. 129, and Vol. II, p. 81.

In General.

The establishment of railway relief associations is not prohibited by section five of the Federal Employers' Liability Act, except in so far as the contracts thereof may attempt to relieve a carrier from the liability created by such act. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Miller, — Ind. —, 119 N. E. 801.

Railroad relief association contracts are rendered void by section 5 of the Federal Employers' Liability Act insofar only as they attempt to relieve an employing railway company from liability for the injury or death of a servant. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Miller, — Ind. —, 120 N. E. 706.

A railway company cannot, under the Federal laws, by contracts of relief associations, preclude a recovery at law for the negligent injury or death of an employee. Blaney v. Baltimore & Ohio R. Co., 28 Ohio C. A. 65.

State Laws Regulating.

Section five of the Federal Employers' Liability Act supersedes a state law, when applied to an interstate carrier, providing that no railway company may establish or maintain or assist in so do-

ing, any relief association or society which shall require any person or employee becoming a member thereof to contract, agree, or stipulate, directly or indirectly, to surrender or waive any right of action against the railway company for personal injuries or death, or that the assertion of such a claim shall have that effect, and declaring all such contracts null and void. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co, Miller, — Ind. —, 119 N. E. 801.

Section 5 of the Federal Employers' Liability Act supersedes a state law declaring that no railway company owning or operating a railway line within the state, may establish, maintain, or assist in establishing or maintaining, any relief association or society which shall require its members to contract directly or indirectly to surrender or waive any right of action against the employing railway for the injury or death of a servant. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Miller, — Ind. —, 120 N. E. 706; Vandalia R. Co. v. Sanders, — Ind. —, 121 N. E. 275.

H. Release of Existing Cause of Action.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 93-94, No. 3, p. 130, No. 4, p. 46, and Vol. II, p. 81.

By One Ignorant of English.

A release of an existing cause of action by an injured employee is not a bar to an action under the Federal Employers' Liability Act, when executed by one ignorant of the English language under the impression that it was in settlement of his claim for lost time under the state Workmen's Compensation Act. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54.

Settlement With Parent as Bar to Action by Administrator.

The settlement by a mother of her claim against a railway company for the death of her son, does not preclude an action by a personal representative under the Federal Employers' Liability Act for the benefit of the surviving parents. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Settlement by Injured Employee With Negligent Coemployee.

A settlement with and release of a negligent foreman from liability for injuries received by a railway employee is not a defense to an action against the railway company under the Federal Employee's Liability Act. Guy v. Cincinnati Northern R. Co., — Mich. —, 166 N. W. 667; certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Action for Death, Barred by Settlement for Injuries.

Satisfaction by settlement or otherwise by a railway servant of his pending action for personal injuries operates as a bar to a subsequent action after his death by his personal representative for the benefit of the next of kin. Connors v. New York Cent. R. Co., 20 Oh. N. P. (N. S.) 573.

I. Stipulations For Notice of Injury.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 94, and Vol. II, pp. 81, 82.

(No new decisions.)

V. WHAT CARRIERS AND TRAFFIC WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 94-96, No. 3, p. 130, No. 4, p. 47, and Vol. II, p. 82.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 94, No. 3, p. 130, No. 4, p. 47, and Vol. II, p. 82.

Interstate Railway.

A railway company which hauls freight from one state to another is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Connelly v. Michigan Cent. R. Co., 207 Ill. App. 25.

It is carriers engaged in interstate commerce which the Federal Employers' Liability Act seeks to regulate. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

Intrastate Line Connecting with Interstate Carriers.

A railway lying wholly within one state is within the purview of the Federal Employers' Liability Act, where, at both ends, such road connects with interstate railway lines, and all of the trains of such company constantly carry indiscriminately both interstate and intrastate passengers and freight. Chicago, K. & S. R. Co. v. Kindlesparker, — C. C. A. —, 234 Fed. 1, reversed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 425.

Express Companies.

An express company which, under contract, transports property over the lines of an interstate railway, is a carrier by rail within the meaning of the Federal Employers' Liability Act. Taylor v. Wells Fargo & Co., — C. C. A. —, 249 Fed. 109, S. C. 136 C. C. A. 402, 220 Fed. 796.

B. Carriers of Passengers.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 95.

(No new decisions.)

C. Terminal Companies.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 95.

In General.

A terminal railway company over the tracks of which all interstate trains of several trunk lines enter and leave a city, is engaged in interstate commerce within the purview of the Federal Employers' Liability Act. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

D. Electric Railway Companies.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 95, No. 4, p. 47, and Vol. II, p. 82.

Injury to servant repairing power line, see infra VI, E, 1.

In General.

An electric street railway company engaged in interstate commerce is within the Federal Employers' Liability Act. Nelson v. Ironwood & Bessemer Ry. & L. Co., — Mich. —, 170 N. W. 45.

E. Carriers Operating Boats.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 95, No. 4, p. 47, and Vol. II, p. 82.

In General.

A carrier by water is within the Federal Employers' Liability Act of 1906 while within the territory of Alaska, since such law was not repealed by the Federal Employers' Liability Act of 1908, with respect to its operation in the District of Columbia and the territories of the United States. Walsh v. Alaska Steamship Co., — Wash. —, 172 Pac. 269.

A servant employed on a boat used in interstate commerce by an interstate railway company, is within the Federal Employers' Liability Act. The Erie Lighter 108, 250 Fed. 490.

F. Logging Roads.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 96, and No. 3, p. 130.

(No new decisions.)

G. Lessors and Lessees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 96.

When State Law Renders Both Liable.

A joint action under the Federal Employers' Liability Act will lie against both a lessor and a lessee railway company for injuries incurred by a servant of the former by the negligence of the latter company, when the state law makes both lessor and lessee liable for the negligence of the other. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

VI. WHAT EMPLOYEES WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 96-122, No. 3, pp. 130-135, No. 4, p. 47, and Vol. II, pp. 83-94.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 96, No. 3, p. 130, No. 4, p. 47, and Vol. II, p. 83.

1. Necessity for Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 96, No. 3, p. 130, and Vol. II, p. 83.

In General.

To authorize a recovery under the Federal Employers' Liability Act it is necessary that the carrier and the injured employee should both have been engaged in interstate commerce at the time of the latter's injury. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986; Borrow v. Chicago, Burlington & Quincy R. Co., 206 Ill. App. 287; Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285; Sells v. Grand Trunk Western R. Co., 206 Ill. 45, certiorari denied in both cases by Supreme court; Carlson v. Chicago Great Western R. Co., 205 Ill. App. 156.

A liability under the Federal Employers' Liability Act does not arise unless the particular service an employee is engaged in at the time of his injury is a part of interstate commerce. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

A railway employee cannot recover under the Federal Employers' Liability Act for injuries unless both himself and the defendant railway company were engaged in interstate commerce at the time of the accident. Ohio Valley Electric R. Co. v. Brumfield, — Ky. —, 203 S. W. 541; Probus v. Illinois Cent. R. Co., — Ky. —, 203 S. W. 862.

To bring himself within the terms of the Federal Employers' Liability Act a servant must show that both he and his employer were engaged in interstate

commerce at the time the former was injured or killed. Brier v. Chicago, Rock Island & Pac. R. Co., — Iowa —, 168 N. W. 339.

A servant cannot recover under the Federal Employers' Liability Act for injuries unless he was engaged in interstate commerce at the time they were incurred. O'Dell v. Southern R. Co., 248 Fed. 343, affirmed — C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S. —, 63 L. ed. — 39 Sup. Ct. Rep. 6.

In order to bring an action within the terms of the Federal Employers' Liability Act it must appear that both the injured employee and the defendant were engaged in interstate commerce. Rodeh v. Lake Shore & Mich. So. R. Co., 27 Oh. Ct. App. 571.

It is not indispensable that a servant should be engaged in interstate transportation in the sense that he was assisting in the operation of a train engaged in such commerce, or in the repair of trains, fixtures, appliances, or tracks, the repair of which was at the time indispensable or necessary in the conduct of the interstate business of the carrier, in order to bring him within the protection of the Federal Employers' Liability Act. Ohio Valley Electric R. Co. v. Brumfield —, Ky. —, 203 S. W. 541.

Necessity for Contract Relation.

The liability created by the Federal Employers' Liability Act is to the employee of the carrier and to no other. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

The employment of the plaintiff by the defendant is essential to a recovery under the Federal Employers' Liability Act. Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285, certiorari denied by supreme court.

Servant Running Train Over Road of Another Company.

A brakeman engaged in running an interstate train over the track of another company is not the latter's servant within the meaning of the Federal Employers' Liability Act, although the contract between the two companies is to the effect that each shall be responsible for all damages to persons or property due to accidents on its road, but without contemplating that the servants of one company shall be regarded as employees of the other while on its line. Hull v. Philadelphia & Reading R. Co., — Md. —, 104 Atl. 274.

Employee of Independent Contractor.

A carrier is not liable under the Federal Employers' Liability Act for injuries sustained by a person engaged in keeping coal pockets filled, where he was employed by one who had an oral contract with the carrier to do such work for a specified sum and to employ all necessary labor. Polluck v. Minneapolis & St. Louis R. Co., — S. Dak. —, 166 N. W. 641, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

Binding Effect of Concession as to Nature of Employment.

A concession by the defendant in an action based on the Federal Employers' Liability Act, that a servant was engaged in interstate commerce at the time he was injured, is binding on the defendant on subsequent trials, although it is discretionary with the court to grant relief therefrom. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

8. Test of Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 98, No. 3, p. 130, and Vol. II, p. 83.

In General.

The character of a servant's employment with respect to interstate or intrastate commerce is fixed by what he was doing at the time of his injury. O'Dell v. Southern R. Co., 248 Fed. 343, affirmed— C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S., —, 63 L. ed. — 39 Sup. Ct. Rep. 6.

A servant performing an act which directly and immediately tends to facilitate the movement of interstate commerce, or whose failure to do so directly or immediately interferes with or hinders the movement of such commerce, is engaged therein within the meaning of the Federal Employers' Liability Act. Morrison v. Chicago, Milwaukee & St. Paul R. Co., — Wash, —, 175 Pac. 325.

When an employee is injured while engaged in employment that is essential to the successful operation of a railway by a carrier that is engaged in interstate commerce, he also is engaged in such commerce within the meaning of the Federal Employers' Liability Act. Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604, affirming 215 Fed. 285, certiorari denied 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

The decisive consideration in determining whether a servant is within the purview of the Federal Employers' Liability Act, is always the closeness or remoteness of a particular work, as related to interstate transportation. Southern Pac. Co. v. Industrial Accident Commission, — Cal. —, 171 Pac. 1071.

A railway employee is within the protection of the Federal Employers' Liability Act when injured while engaged in any act so directly and immediately connected with the interstate business of a carrier as to substantially form a part or a necessary incident thereof, although not directly connected with an interstate train movement, but a work preliminary thereto. Cincinnati, New Orleans & Texas Pac. R. Co. v. Morgan, — Tenn. —, 201 S. W. 128.

A railway employee is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, while doing a work which directly affects or facilitates the transportation of interstate traffic. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

A railway employee is within the Federal Employers' Liability Act when injured while engaged in a work so closely related to interstate commerce as to be practically a part thereof. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408; Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by Supreme Court.

It is the employment of a servant rather than the act he is engaged in at the time he is injured, which determines whether he is within the protection of the Federal Employers' Liability Act. Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705.

Whether a servant is, at the time of his injury or death, engaged in interstate transportation or in any work so closely related thereto as to be practically a part thereof, is the true test of employment in interstate commerce within the meaning of the Federal Employers' Liability Act. Brier v. Chicago, Rock Island & Pac. R. Co., — Iowa —, 168 N. W. 339.

If a servant be employed in aiding, furthering, or facilitating interstate commerce, and if his efforts be necessary to the business of a railway company as an interstate carrier, he is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, even though a portion of his time may be occupied in work wholly connected with intrastate traffic. Probus v. Illinois Cent. R. Co., — Ky. —, 203 S. W. 862.

A servant is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, if injured or killed while employed at a work which is so closely related to or connected with such commerce as to be practically a part thereof. Perez v. Union Pac. R. Co., — Utah —, 173 Pac. 236.

The Federal Employers' Liability Act refers to interstate commerce in a practical sense; and the test is whether the employee at the time of the injury was engaged in interstate transportation, or in a work so closely related thereto as to be practically a part thereof. Eskelsen v. Union Pac. R. Co., — Neb. —, 168 N. W. 366, denying rehearing to 167 N. W. 408.

3. Employees of Interstate Carriers engaged in Intrastate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 99.

In General.

It is carriers engaged in interstate commerce that the Federal Employers' Liability Act seeks to regulate; and it extends to and was intended to include all servants whose employment relates to such commerce, and if the carrier is also at the same time engaged in intrastate commerce, using the same means and agencies for both, the act covers all employees whose services relate to such means and agencies. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

B. Scope of Employment.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 98, No. 3, p. 130, and Vol. II, p. 84.

1. What Within.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 99, No. 3, p. 130, and Vol II, p. 84.

Employee Arriving at Work Before Appointed Time.

A section man employed by an interstate railway was within the protection of the Federal Employers' Liability Act when killed by a passing train after his arrival at a tool house ten minutes before the time for commencing work for the day. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

Engineer Leaving Yard Hour After Work Completed.

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that an engineer was not in the carrier's service at the time he was killed while leaving a railroad yard by the usual route about an hour after the completion of his run, where he had to first clean up, change his clothing and deliver his work report and time slip to the proper person. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

Employee on Way from Tool Shanty With Tools.

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that at the time a car inspector was injured he was in a place his

duties did not take him, where, while on his way with tools from a tool shanty to repair a car 600 feet away, he was injured when he attempted to board moving cars to ride to his work. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Section Man on Way for Drinking Water.

A section hand who is injured while on his way with a hand car at noon to obtain drinking water, as was customary is engaged in the line of his employment within meaning of the Federal Employers' Liability Act. Bradley v. Vandalia R. Co., 207 Ill. App. 592.

C. Employees Engaged in Original Construction Work.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 100-102, No. 3, p. 131, No. 4, p. 47, and Vol. II, p. 84.

1. In General.

Fill Beneath Trestle.

A servant employed in constructing an earthen fill to supersede a trestle over which interstate and intrastate traffic is carried, is not within the protection of the Federal Employers' Liability Act, since the fill does not become a part of the railroad until it is completed and the track placed thereon. Kinzell v. Chicago, Milwaukee & St. Paul R. Co., — Idaho, —, 171 Pac. 1136.

Constructing New Pipe Line.

A railway employee engaged in constructing a new pipe line for future interstate use is not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Day v. Chicago, Milwaukee & St. Paul R. Co., 208 Ill. App. 351.

5. Telegraph and Telephone Lines.

See also same section Vol. II, No. 2, p. 84.

In General.

A telegraph lineman in the employ of a railway lying wholly within one state, but over which interstate traffic was transported, was within the protection of the Federal Employers' Liability Act, where he was injured while assisting in raising a new telegraph pole to carry the wires over which messages were transmitted in directing the operation of trains. Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604, affirming 215 Fed. 285, certiorari denied 245 U. S. 681, 62 L. ed. —, 38 Sup Ct. Rep. 345.

D. Employees Demolishing Buildings.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 102.

(No new decisions.)

E. Employees Engaged in Maintenance and Repair Work.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 102-106, No. 3, p. 131, No. 4, p. 46, and Vol. II, p. 84-87.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 102, No. 4, p. 47, and Vol. II, p. 84.

Employee Repairing Main Electric Power Line.

A servant is not within the purview of the Federal Employers' Liability Act when injured while working on a main power line between a power house and a substation where high voltage electric current is transformed and reduced before passing into the trolley wires of an interstate electric railway. Southern Pac. Co. v. Industrial Accident Commission, — Cal. —, 171 Pac. 1071.

Camp Car Cook.

A servant engaged in caring for a camp car, keeping it clean, attending to the beds and cooking the meals for himself and the members of a bridge crew who were repairing a bridge over which both interstate and intrastate traffic was carried, was within the terms of the Federal Employers' Liability Act when injured while the car was on a side track where it had been standing for several weeks. Philadelphia, Baltimore & Washington R. Co. v. Smith, — Md. —, 103 Atl. 945.

Repairing Motor Used for Coaling Engines.

The fact that when injured a servant was engaged in repairing a motor used on a coal dock which at some time in the past might have been used in interstate commerce, or which at some future time might be so used, does not bring him within the protection of the Federal Employers' Liability Act. O'Dell v. Southern R. Co., 248 Fed. 343, affirmed — C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

Repairing Coal Pockets or Chutes.

A carpenter who was killed while repairing a coal pocket which was used from time to time in coaling engines engaged in both interstate and intrastate traffic as desired, was not within the protection of the Federal Employers' Liabil-

ity Act. Gallagher v. New York Central R. Co. 180 App. Div. 88, 167 N. Y. Supp. 480, affirmed 222 N. Y. 649, 119 N. E. 1044, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct., Rep. 6.

Track Repairs.

A repair gang is within the scope of the Federal Employers' Liability Act while constructing a temporary track for use while the grade of a main interstate line is being altered. Crecelius v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 205 S. W. 181.

A servant performing service in connection with the track, or the embankment on which an interstate track is laid, is engaged in a work so closely related to interstate transportation as to be practically a part thereof within the meaning of the Federal Employers' Liability Act. Ohio Valley Electric Co. v. Brumfield, — Ky. —, 203 S. W. 541.

Timekeeper of Repair Gang.

The timekeeper of a gang of men repairing a main interstate railway track and constructing a temporary track for use while the grade of the main track was being lowered, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where, after the completion of his day's work, he was killed while on the way to a telegraph office to send his daily report to the roadmaster. Crecelius v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 205 S. W. 181.

8. Bridges.

See also same section Federal Ry. Digest. Vol. I, No. 2, p. 102, and Vol. II, p. 85.

Painter on Way for Paint.

A member of a gang engaged in painting bridges and buildings along the line of an interstate railway, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was killed by an interstate train while on his way with a "speeder" to obtain paint. Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705.

13. Cleaning Up Wrecks.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 105, and Vol. II, p. 86.

In General.

An employee of a terminal railway company who is injured while assisting in replacing on a track a derailed locomotive used by a lessee in hauling an interstate train, in order to take the same to a roundhouse for repairs and to clear the track for the passage of other interstate trains, is engaged in interstate commerce within the contemplation of the Federal Employers' Liability Act. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

Raising Locomotive From Turntable Pit.

A servant is within the terms of the Federal Employers' Liability Act while raising a locomotive which fell into the pit of a turntable used to turn engine employed in interstate traffic. Deuel v. Chicago, Burlington & Quincy R. Co., 253 Fed. 857.

14. Handling New or Old Rails and Ties.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 105, No. 3, p. 131, and Vol. II, p. 86.

Distributing New Rails.

A servant is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, when injured while removing from a car new rails along the main line of an interstate railway for repairing the same. Reed v. Dickinson, — Iowa —, 169 N. W. 673.

Handling Old Ties.

A servant who in order to strengthen a fill on an interstate railway, was injured while throwing from a car, old and useless cross-ties which had been gathered from along the right of way, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Ohio Valley Electric R. Co. v. Brumfield, —Ky. —, 203 S. W. 541.

A judgment for the plaintiff, in an action under the Federal Employers' Liability Act for injuries sustained while throwing old and worn out cross-ties from a car onto a fill on an interstate railway, will not be disturbed on the ground that he was not engaged in interstate commerce where the evidence is conflicting as to whether it was being done in order to strengthen the fill or merely as a convenient method of disposing of old rubbish. Ohio Valley Electric R. Co. v. Brumfield — Ky. —, 203 S. W. 541.

Gathering Rails From Right of Way.

An employee engaged in loading on flat cars old rails which had just been removed from an interstate railway line and replaced with new ones, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

A section hand who is injured while moving old rails from the place where they were removed from an interstate track to a dump near a tool house, was

not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, when such rails were not intended for future use. Perez v. Union Pac. R. Co., — Utah —, 173 Pac. 236.

A servant who is injured while gathering up old rails from beside an interstate main line, from which they were removed some time before and replaced with new rails, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Kusturin v. Chicago & Alton R. Co., 209 Ill., App. 54.

F. Employees Connected With Movement of Interstate Trains.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 106-114, No. 3, p. 132, No. 4, p. 47, and Vol. II, pp. 87-90.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 106, No. 3, p. 132, No. 4, p. 47, and Vol. II, pp. 87, 88.

Employee on Interstate Train.

The Federal Employers' Liability Act controls an action for injuries received by a fireman upon an engine drawing an interstate train. Royer v. Pennsylvania R. Co., — Pa. —, 103 Atl. 276.

Cleaning Boilers Which Furnish Energy to Move Trains.

A person cleaning boilers used to generate electricity for both interstate and intrastate railway lines is within the purview of the Federal Employers' Liability Act. Seattle v. Baltimore & Ohio S. W. R. Co., — C. C. A. —, 249 Fed. 913.

Instructors.

An electrical engineer employed by an interstate carrier to instruct its motormen how to operate motors used in interstate business, is while so employed engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Dumphy v. Norfolk & Western R. Co., —W. Va.—, 95 S. E. 863.

2. Particular Employees.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 106-111, No. 3, pp. 132-133, No. 4, p. 47, and Vol. II, pp. 88-90.

(b) Baggage Men.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 107.

In General.

A servant employed at a transcontinental station handling interstate and intrastate baggage, is within the protection of the Federal Employers' Liability Act. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

The plaintiff need not allege or prove, in an action under the Federal Employers' Liability Act, that a trunk which fell upon and injured a baggage handler at a transcontinental station, was moving in interstate commerce where practically all of the baggage handled was interstate in character. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

(f) Cinder Pit Cleaner.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 107.

Employee of Independent Contractor.

An interstate railway company is not liable under the Federal Employers' Liability Act for injuries sustained by a man engaged in keeping a cinder pit clean, where he was employed by a third person who had an oral contract with the carrier to do such work for a specified amount and to employ all necessary labor. Polluck v. Minneapolis & St. Louis R. Co., — S. Dak. —, 166 N. W. 641, certiorari denied — U. S. —, 63 L. ed. —, 39, Sup. Ct. Rep. 6.

Repairing Motor Used for Removing Cinders.

Employment in interstate commerce is not shown by the fact that when injured a servant was repairing an electric motor used to remove cinders from a pit into which they were dumped from locomotives long after the completion of interstate trips, it not appearing that any cinders so removed by the motor either before or after the accident were used to ballast an interstate roadbed. O'Dell v. Southern R. Co., 248 Fed. 343, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

(g) Coal Dock Hands.

See also same section Federal Ry. Digest. Vol. I, No. 2, p. 108, No. 3, p. 132, and Vol. II, p. 88.

Contract with third person to coal engines, as contract relieving carrier from liability for its negligence, see supra IV, A.

In General.

An employee was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when injured while working about and upon a coal dock engaged in supplying coal, water and sand to engines moving in interstate commerce, although some of them laid up over night at the dock and resumed their interstate journeys the next morning. Guy v.

Cincinnati Northern R. Co., — Mich. —, 166 N. W. 667, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Employee Repairing Hoist.

An engineer who was injured while repairing a hoist used to fill coal pockets from which locomotives engaged almost exclusively in interstate commerce were coaled, was within the protection of the Federal Employers' Liability Act. Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by supreme court.

Employee of Independent Contractor.

The evidence in an action under the Federal Employers' Liability Act held to show that a servant who was injured while working about a coal dock, was an employee of a railway company and not of an independent contractor who coaled, watered and sanded interstate locomotives under a contract with the railway. Guy v. Cincinnati Northern R. Co., — Mich. —, 166 N. W. 667, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

A carrier is not liable under the Federal Employers' Liability Act for injuries sustained by a person engaged in keeping coal pockets filled, where he was employed by one who had an oral contract with the carrier to do such work for a specified sum and to employ all necessary labor. Polluck v. Minneapolis & St. Louis R. Co., — S. Dak. —, 166 N. W. 641, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

(k) Electric Railway Employees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 108, No. 3, p. 132, and Vol. II, p. 89.

Street Car Motorman.

A motorman is within the Federal Employers' Liability Act while operating a street car making regular trips between different states, notwithstanding that his own trip lies entirely within one state. Nelson v. Ironwood & Bessemer Ry. & L. Co., — Mich. —, 170 N. W. 45.

(m) Express Messengers.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 109, and No. 3, p. 132.

In General.

An express messenger in the service of an express company which transports property over the lines of an interstate railway, is within the scope of the Federal Employers' Liability Act. Taylor v. Wells Fargo & Co., —C. C. A.—, 249 Fed. 109, S. C. 136 C. C. A. 402, 220 Fed. 796.

(n) Freight Handlers

See also same section Federal Ry. Digest Vol. I, No. 2, p. 109, and No. 3, p. 132.

Freight Handlers.

A servant is not within the protection of the Federal Employers' Liability Act when injured while unloading interstate freight from a car several days after its arrival at destination. Morrison v. Chicago, Milwaukee & St. Paul R. Co., — Wash. —, 175 Pac. 325.

Freight Checker.

A person employed in checking from a car freight which came from another state is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Connelly v. Michigan Cent. R. Co., 207 Ill. App. 25.

3. Preparation for Trip.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 111, and Vol. II, p. 90.

(c) Preparing and Inspecting Engines.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 111.

Caring for Cab Lights.

An employee of a carrier whose principal duties were to care for the cab lights of locomotives coming into a yard devoted to both interstate and intrastate commerce, was not within the Federal Employers' Liability Act when he was killed while going from one engine to another in the discharge of his duties, where it did not appear that either engine was employed in interstate commerce. Lincks v. Erie R. Co., — N. J. —, 103 Atl. 176.

(d) Setting Switches.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 111.

In General.

A passenger brakeman was within the Federal Employers' Liability Act, where, while setting switches to let an interstate train onto the main track at a terminal point preparatory to its trip, he was injured by the negligence of a coemployee. Cincinnati, N. O. & T. P. R. Co. v. Goode, 155 Ky. 153, 159 S. W. 695 (for facts see 153 Ky. 247, 154 S. W. 941), S. C. 163 Ky. 60, 173 S. W. 329, 169 Ky. 102, 183 S. W. 264, writ of error dismissed, 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

5. Conduct at End of Run.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 113, No. 3, p. 133, and Vol. II, p. 90.

(a) In General.

See also Federal Ry. Digest, Vol. I, No. 2, p. 133.

Riding on Detached Caboose.

A conductor was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act where, after the completion of an interstate run of his train he was injured while riding on the detached caboose which was running alone down a descending grade, on his way to deliver waybills at a freight office. O'Neill v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 1008.

G. Employees Connected With Movement of Intrastate Trains.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 114, No. 3, 133, and Vol. II, p. 90.

1. In General.

See also same section Federal Ry. Digest, Vol I, No. 3, p. 133, No. 4, p. 47, and Vol. II, p. 90.

Car Inspector.

Since the Safety Appliance Act requires the inspection and repair of cars used on an interstate road, a servant engaged in inspecting and making light repairs on both interstate and intrastate cars on such a road is within the protection of the Federal Employers' Liability Act when killed while passing about a railway yard in the discharge of his duties. Southern Pac. Co. v. Industrial Accident Comm., — Cal. —, 175 Pac. 453.

Moving Interstate Cotton for Compress.

Employment in interstate commerce within the meaning of the Federal Employers' Liability Act, is shown by the fact that a brakeman was injured when moving a car of cotton to an intrastate point for compressing while in transit to an interstate destination. Chicago, Rock Island & Pacific R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

H. Moving Cars of Fuel and Water.

See also same section Federal Ry. Digest. Vol. I, No. 2, p. 115, and Vol. II, p. 91.

(No new decisions.)

I. Employees Engaged in Switching.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 116-118, No. 3, p. 134, and Vol. II, pp. 91, 92.

2. Interstate Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 116, No. 3, p. 134, and Vol. II, p. 91.

In General.

A brakeman making up a train for movement to another state is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Gaddy v. North Carolina R. Co., —, N. C. —, 95 S. E. 925.

A switchman who was killed while returning to his engine some distance away after moving 50 or 60 cars some of which were engaged in interstate commerce, was engaged in such commerce within the meaning of the Federal Employers' Liability Act where his regular duties consist of handling both interstate and intrastate traffic. Erie R. Co. v. Downs, — C. C. A. —, 250 Fed. 415, certiorari denied — U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 583.

Placing Engine on Storage Track.

A servant is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, while placing on a storage track for the night a locomotive which had just been coaled, watered and sanded after the completion of its regular daily interstate trip to which it was permanently devoted. Palermo v. Erie R. Co., — App. Div. —, 173 N. Y. Supp. 456.

Breaking up Interstate Trains.

A switch engine engaged in breaking up trains conveying interstate traffic is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by supreme court.

In breaking up a freight train containing interstate traffic either for delivery to consignees or for further intrastate transportation, a switchman is engaged in interstate commerce within contemplation of the Federal Employers' Liability Act. Southern Pac. Co. v. Stephens, — Tex. Civ. App. —, 201 S. W. 1076.

Coupling Engine to Interstate Car.

An employee is within the terms of the Federal Employers' Liability Act when injured while coupling an engine to a car which came from one state and which was destined for movement to another state

in a train containing other interstate cars that was being made up. Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Motorman in Railway Yard.

A servant of a railway company which is engaged in interstate commerce is not employed therein within the meaning of the Federal Employers' Liability Act, when injured while operating a gasoline motor carrying switchmen from one end of a railway yard to the other after they have disposed by gravity of cars which, although moving in intrastate commerce, were subject to reconsignment to interstate points. Illinois Cent. R. Co. v. Industrial Board, — Ill. —, 119 N. E. 920.

4. Empty Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 118, No. 3, p. 134, and Vol. II, p. 92.

In General.

An employee who was injured while placing an empty foreign car on a sidetrack to be returned to the owner road in another state, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Fayssoux v. Seaboard Air Line R. Co., — S. C. —, 96 S. E. 150.

Where an empty car marked "shop" is being switched from the yards of one carrier, where it has stood empty for several days, to the interchange track of the owner for repairs, the switching being wholly within one state, an employee injured while engaged in the operation is not within the perview of the Federal Employers' Liability Act, although the car was forwarded promptly by its owner to a shop in another state for repairs. Ewing v. Coal & Coke R. Co.,— W. Va. —, 96 S. W. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

A switchman who, while riding empty intrastate cars which collided with an interstate car, was injured because the latter car was not equipped with a drawhead or end-sill, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Ward v. Erie R. Co., — App. Div. —, 172 N. Y. Supp. 691.

J. Roundhouse Employees.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 118, No. 3, p. 134.

Hostler.

A hostler, while working about and preparing for a trip a locomotive used habitually and exclusively in interstate commerce, and which had been specially designated for an interstate journey before his work begun, was engaged in such commerce within the meaning of the Federal Employers' Liability Act. Cincinnati, New Orleans & Texas Pac. R. Co. v. Morgan, — Tenn. —, 201 S. W. 128.

K. Shop Employees.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 119-122, No. 3, p. 134, No. 4, p. 47, and Vol. II, p. 92.

1. In General.

See also same section Federal Ry. Digest, Vol. II, No. 2, p. 119, No. 3, p. 134, No. 4, p. 47, and Vol. II, pp. 92-94.

Repairing Engines.

An employee was within the terms of the Federal Employers' Liability Act when injured while repairing a locomotive owned by an intrastate railway company, which was used indiscriminately, both before and after its repair, in switching, and in moving on the road both interstate and intrastate traffic. Chicago, K. & S. R. Co. v. Kindlesparker, — C. C. A. —, 234 Fed. 1, reversed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 425.

An employee may recover under the Federal Employers' Liability Act for injuries sustained while repairing a locomotive which was withdrawn from service for 79 days, where both before and after its repair it was used indiscriminately in switching and moving both interstate and intrastate traffic. Chicago, K. & S. R. Co. v. Kindlesparker, — C. C. A. —, 234 Fed 1, reversed 246 U. S. —, 62 L. ed —, 38 Sup. Ct. Rep. 425.

An employee is not within the terms of the Federal Employers' Liability Act when injured while repairing an engine which was used indiscriminately in both interstate and intrastate commerce, and which was withdrawn from traffic nearly three months during repairs, the plaintiff being injured sometime after such withdrawal. Chicago & Alton R. Co. v. Allen, — C. C. A. —, 249 Fed. 280.

An employee is within the protection of the Federal Employers' Liability Act when injured while repairing a locomotive which was used exclusively in interstate commerce prior to the accident, and which was being repaired so as to be again used therein and was so used after the repairs were completed. Kuchenmeister v. Los Angeles, & Salt Lake R. Co., — Utah, —, 172 Pac. 725.

A servant who is injured while repairing an engine used to pull an interstate train, after it is taken from the line track and placed in a roundhouse for repairs, is not within the protection of the Federal

Employers' Liability Act. Chicago, Rock Island & Pac. R. Co. v. Cronin, — Okla. —, 176 Pac. 919.

Employee Threading Bolt.

A shop employee is within the protection of the Federal Employers' Liability Act when injured while threading a bolt to be placed on a locomotive regularly used in interstate commerce. Atlantic Coast Line R. Co. v. Woods — C. C. A. —, 252 Fed. 428, S. C. 151 Fed. 651, 238 Fed. 917.

4. Repairing Empty Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 120.

In General.

A car repairer was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, when injured while repairing an empty car after it had completed an interstate trip, where it did not appear that it was used exclusively in such commerce, nor that it was employed therein immediately after being repaired. Deffenbaugh v. Union Pac. R. Co., — Kan. —, 171 Pac. 647.

A servant repairing a caboose customarily used and to be presently used in interstate trains, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. King v. Norfolk & Southern R. Co., — N. C. —, 79 S. E. 29.

L. Employees on Way to or From Work.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 121-122, No. 3, p. 135, and Vol. II, p. 93.

In General.

A railroad employee, if engaged in interstate commerce, who, while on the way to or from his work, is injured in consequence of the master's negligence, may recover under the Federal Employers' Liability Act. Eley v. Chicago Great Western R. Co., — Iowa —, 166 N. W. 739.

A servant who is employed in interstate commerce while actually at work, is, within the contemplation of the Federal Employers' Liability Act, so engaged while leaving a carrier's premises at the close of the day's work by the proper and usual way or by one known to and expressly or tacitly permitted by the employer. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

The cause of an employee's death is not conjectural in an action based on the Federal Employers' Liability Act, when the evidence tends to show that he was struck by a backing locomotive at a point where there was much travel across the tracks to and from a railway yard where the decedent would naturally be crossing at the close of his work. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

An electrical engineer employed by an interstate carrier to instruct its motormen how to operate motors used in interstate traffic, remains an employee of the company, within the meaning of the Federal Employers' Liability Act, while attempting, under orders from his superior, to board a moving train to return to the initial point where his services began and ended for the day, his time and pay also beginning and ending at such point, where his regular duties required him to ride both passenger and freight trains and at times to board them when in motion. Dumphy v. Norfolk & Western R. Co., — W. Va. —, 95 S. E. 863.

A servant who was injured while walking along a railway track on his way to repair the residence of the general manager of an interstate railway company, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Walden v. Cumberland R. Co., — Ky. —, 203 S. W. 854.

A member of the crew of a switch engine which was used exclusively in moving interstate traffic, although sometimes intrastate traffic was handled, was within the terms of the Federal Employers' Liability Act, where, while on his way through a railway yard to report for duty and to obtain his working clothes, he was killed about eight minutes before his work was to begin. Knowles v. New York, New Haven & Hartford R. Co., 223 N. Y. 513, 119 N. E. 1023, reversing 177 App. Div. 262, 164 N. Y. Supp. 1.

Carrying Servants to Work on Motor.

A servant is not within the Federal Employers' Liability Act when injured while running a gasoline motor car conveying workmen from their place of residence to the roundhouse of an interstate railway company, wherein they were employed generally in making running repairs upon engines and cars used in both interstate and intrastate commerce. St. Louis, Iron Mt. & Southern R. Co. v. True, — Okla. —, 176 Pac. 758.

Work Train Employees.

A work train conductor was within the protection of the Federal Employers' Liability Act when injured while returning with his train after having distributed cross-ties along an interstate railway track for use in repairing the same. Eley v. Chicago Great Western R. Co., — Iowa —, 166 N. W. 739.

Section Hands.

A section foreman was within the protection of the Federal Employers' Liability Act, when injured while on his way over an interstate line of railway with a hand car to make repairs to the track under his control at a point where he was informed there had been a washout, although in fact it was on a private spur track off such interstate line, and no repairs were necessary at or near the interstate line. Atlantic Coast Line R. Co. v. Tomlinson, — Ga. App. —, 94 S. E. 909.

A section man on an interstate railway is within the scope of the Federal Employers' Liability Act when killed while riding on a handcar to a point designated by his foreman. Williams v. Chesapeake & Ohio R. Co., — Ky. —, 204 S. W. 292.

Signal Repairman.

A person employed to look after, repair and maintain block signals on a designated section of an interstate railway was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was killed while on his way home after inspecting the last signal in his section. Louisville & Nashville R. Co. v. Mullins, — Ky. —, 203, S. W. 1058.

Repairman Going About Yard.

One whose general employment is to make light repairs on both interstate and intrastate cars in a railway yard, and who worked on an average of 25 cars daily, was engaged in interstate commerce within the purview of the Federal Employers' Liability Act, when struck and killed by an empty car as he was passing from one lot of cars to another. Southern Pac. Co. v. Industrial Accident Comm., — Cal. —, 175 Pac. 453.

Employee on Way to Roundhouse for Private Purpose.

A fireman who completed an interstate run Saturday evening and who was to go out again early Monday morning, was not within the protection of the Federal Employers' Liability Act where, on Sunday, he was struck and killed by a locomotive while he was on his way through a yard to the roundhouse to transfer his tools from a "pony" engine to an interstate engine, and to get his overalls to take home to be washed. Hansen v. New York Central & Hudson R. R. Co., — N. J. —, 103 Atl. 200.

Painter on Way for Paint.

A member of a gang painting bridges and buildings along an interstate railway is not within the Federal Employers' Liability Act while going after paint with a "speeder." Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705.

M. Miscellaneous Employees.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 135.

Servant Unloading Lumber.

A servant who was injured while unloading a car of lumber which came from another state, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where the lumber was to be made into doors for grain cars which were used in such commerce. Gulf, Colorado & Santa Fe R. Co. v Drennan, — Tex. Civ. App. —, 204 S. W. 691.

A member of a track repair gang is not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, when injured while unloading timber from a car on an interstate line, in the absence of evidence as to the future use of the timber. Anania v. Philadelphia, Baltimore & Washington R. Co., 26 Pa. Dist. Rep. 667.

An employee who was injured while unloading from a car for storage for future use bridges timbers which came from another state, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Southern R. Co. v. Maxwell, — Miss. —, 77 So. 905.

Unloading Tiles.

A member of a gang engaged in unloading from cars tiles intended for future use in replacing culverts under an interstate track as they wore out, is not within the protection of the Federal Employers' Liability Act. Morrison v. Chicago, Milwaukee & St. Paul R. Co., — Wash —, 175 Pac. 325.

Unloading Ice.

A servant employed in a railway yard to clean and ice cars used in both interstate and intrastate traffic, is not within the protection of the Federal Employers' Liability Act when injured while on the way with a push car to receive ice from a wagon and which was to be placed into a box from which it was removed as required, notwithstanding that in due course the first car to be iced would have been one used in interstate traffic. Southern R. Co. v. Pitchford, — C. C. A. —, 253 Fed. 736.

Raising Locomotive From Turntable Pit.

A servant is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, while assisting in raising a locomotive which fell into the pit of a turntable used to turn engines employed in interstate traffic, since the work was a clearing of part of a track, or a repairing of an instrumentality, used in such traffic. Deuel v. Chicago, Burlington & Quincy R. Co., 253 Fed. 857.

VII. NEGLIGENCE FOR WHICH CARRIER ANSWERABLE.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 122-149, No. 3, pp. 135-139, No. 4, pp. 48-49, and Vol. II, pp. 94-104.

For definition of negligence, see supra II, D.

Instructions as to negligence, see infra XIX, E, 15.

Negligence as question for jury, see infra XIX, C, 3.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 122, No. 3, p. 135, No. 4, p. 48, and Vol. II, pp. 94-104.

Effect of Federal Act on Common-Law Rules of Negligence.

The common-law rules of negligence were not modified by the Federal Employers' Liability Act. Washington S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

What Constitutes Negligence.

Since negligence is not defined by the Federal Employers' Liability Act it must be taken to mean such act of commission or omission as would at common law have been sufficient to entitle the submission of a case to a jury. Western Maryland R. Co. v. Sanner, 130 Md. 581, 101 Atl. 587, certiorari denied, 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

Willfulness on the part of the defendant is not an element of recovery in an action under the Federal Employers' Liability Act. Dutton v. Atlantic C. L. R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion, 245 U. S. 637, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

Injury Due to Recoil of Unloosened Brake.

The negligence of the defendant is not shown in an action founded on the Federal Employers' Liability Act, by the fact that on releasing a too tightly set brake a brakeman was thrown from a car by the recoil and injured. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

Injury Sustained in Unloading Poles.

The Federal Employers' Liability Act cannot be invoked by the plaintiff for injuries sustained while unloading poles from a car in consequence of a protruding spike in a pole, of which he was unaware, where negligence in failing to provide hooks for handling the poles was not alleged as the proximate cause of the accident, the negligence charged being the failure to disclose a latent defect. Cornell v. West Jersey & Seashore R. Co., — N. J. —, 103 Atl. 380.

Effect of Predisposition to Disease.

The fact that a servant suffered from a slow but incurable and fatal disease of the kidneys will not prevent a recovery under the Federal Employers' Liability Act where his death was hastened by a shock from the too sudden stoppage of a train which would not have affected a sound person. Louisville & Nashville R. Co. v. Wright, — Ala. —, 80 So. 93.

B. Employer as Insurer.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 122.

(No new decisions.)

C. Negligence as Foundation of Liability.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 123, No. 3, p. 136, and Vol. II, p. 94.

In General.

Liability under the Federal Employers' Liability Act is not shown when casual negligence on the part of the defendant does not appear. Robash v. Maine Central R. Co., — Me. —, 103 Atl. 363.

Such injuries only as are the result of the negligence of a railway company are actionable under the Federal Employers' Liability Act. Western Maryland R. Co. v. Sanner, 130 Md., 58, 101 Atl. 587, certiorari denied 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

In an action founded on the Federal Employers' Liability Act it is only necessary for the plaintiff to prove that his injuries were due in whole or in part to the negligence of the defendant. Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285, certiorari denied by supreme court.

The mere fact that a railway employee was engaged in interstate commerce at the time he sustained an injury without negligence on the part of the master, does not create a liability. Woods v. Cincinnati, New Orleans & Texas Pac. R. Co., — Ky. —, 200 S. W. 616.

Negligence on the part of the master is essential to a recovery under the Federal Employers' Liability Act. New Orleans & Northeastern R. Co. v. Harris, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 535, reversing — Miss. —, 71 So. 913.

In order to recover under the Federal Employers' Liability Act the plaintiff must both allege and prove negligence on the part of the defendant. Northern Trust

Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

The plaintiff is not entitled to recover under the Federal Employers' Liability Act unless he alleges and proves negligence on the part of the defendant. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

The plaintiff cannot recover under the Federal Employers' Liability Act when the evidence does not authorize a finding of the defendant's guilt of any of the several acts of negligence charged. Louisville & Nashville R. Co. v. Hixon, — Ga. App. —, 97 S. E. 554.

There can be no recovery under the Federal Employers' Liability Act unless there is evidence warranting the jury in finding that a servant's injury or death was due in whole or in part to the negligence of the master or of fellow servants. Casey v. Boston & Maine R. Co., — Mass. —, 121 N. E. 403.

No recovery can be had under the Federal Employers' Liability Act in the absence of negligence on the part of the defendant railway which caused or contributed to the injury or death of an employee. Going v. Norfolk & Western R. Co., 119 Va. 543, 89 S. E. 914, affirmed 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 22.

When Negligence Not Shown.

There cannot be a recovery under the Federal Employers' Liability Act for the death of a fireman who, while on the ground beside his engine cleaning ashes from the frame under the grate, was struck by a train running without negligence on a parallel track. Going v. Norfolk & Western R. Co., 119 Va. 543, 89 S. E. 914, affirmed 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 22

Where a signal inspector was struck and killed by a train running at reasonable speed, there can be no recovery under the Federal Employers' Liability Act when his danger was not seen by anyone on the engine because he was hidden by a bridge and the smoke and steam from another train. Casey v. Boston & Maine R. Co., — Mass. —, 121 N. E. 403.

D. Necessity That Injury Be Caused by Person or Instrumentiality Employed in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 124, and Vol. II, p. 95.

(No new decisions.)

E. Accident Attributable to Injured Person's Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 125, No. 3, p. 136, and Vol. II, p. 95.

In General.

The Federal Employers' Liability Act does not afford a remedy for injuries due solely to an employee's own reckless and indifferent conduct. Virginian R. Co. v. Linkous, 144 C. C. A. 386, 230 Fed. 88, S. C. 148, C. C. A. 543, 235 Fed. 49, 155 C. C. A. 504, 242 Fed. 916, certiorari denied 242 U. S. 630, 61 L. ed. 537, 37 Sup. Ct. Rep. 15, and 245 U. S. 649, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

A carrier is not liable under the Federal Employers' Liability Act for injuries sustained by a servant in consequence of the absence of a light from the rear end of the tender of a backing locomotive, where the situation causing the injury was created by him leaving the tender of the moving engine with his lantern. Palermo v. Erie R. Co., — App. Div. —, 173 N. Y. Supp. 456.

F. Negligence in General.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 127-149, No. 3, pp. 137-139, No. 4, p. 48, and Vol. II, pp. 96-104.

When negligence question for jury, see infra XIX, C 3.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 127, No. 3, p. 137, No. 4, p. 48, and Vol. II, p. 96.

When Negligence of Master Proximate Cause of Injury.

An employee may recover under the Federal Employers' Liability Act when his injuries were not the proximate result of his violation of a rule of a railway company, but were due to the negligence of the latter. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

Assault by Robber.

The defendant held not guilty of negligence, in an action under the Federal Employers' Liability Act for injuries caused a station master by the assault of a robber as the alleged result of the defendant's failure to keep all of the lamps lighted about a station. Carter v. Atlantic Coast Line R. Co., — S. C. —, 95 S. E. 357.

Boilermaker Rendered Deaf by Noise.

A judgment for the plaintiff in an action under the Federal Employers' Liability Act, held sustained by the evidence, where a boilermaker's helper was rendered deaf by remaining, at the orders of his superior, inside the tank of a locomotive for an unreasonable time holding a heavy piece of iron against the head of rivets while an air hammer was applied to them from the

outside of the tank. Martinson v. Chicago, Burlington & Quincy R. Co., — Neb. —, 166 N. W. 624.

2. Insufficient Number of Employees.

See also same section Vol. II, Federal Ry. Digest, p. 96.

Providing Insufficient Force of Servants.

The mere furnishing of an insufficient force of men for a given work, which causes an injury to one of them, is not actionable negligence under the Federal Employers' Liability Act. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

3. Instructing Employees.

When Failure to Instruct Not Proximate Cause.

There is no liability under the Federal Employers' Liability Act for injuries sustained by a section hand from the derailment of an electric hand car, when no causal negligence is shown between the accident and the alleged negligence of the defendant in failing to instruct the plaintiff as to the proper manner of operating the car and the incident dangers. Robash v. Maine Central R. Co., — Me. —, 103 Atl. 363.

4. Warning of Danger.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 128-130, and Vol. II, p. 96.

When failure to warn, jury question, see infra XIX, C, 3, (w).

Failure to Warn of Approach of Train.

The failure of a section foreman to warn his crew of the close proximity of an extra train before sending them out on the road with a hand car, is not negligence which will render the master liable under the Federal Employers' Liability Act for the death of a member of the crew in a collision with such train, where the foreman was not aware of its presence on the track when he started the crew on their way. Williams v. Chesapeake & Ohio R. Co., — Ky. —, 204 S. W. 292.

8. Rules and Regulations.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 130-133, No. 3, p. 137, No. 4, p. 49, and Vol. II, p. 97.

Negligence in notating rules as jury question, see infra XIX, C, 3 (r).

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 137.

What Rules for Benefit of Employees. — Speed Regulations.

A rule of a carrier limiting the speed of trains entering or passing stations when occupied by another train which is receiving or discharging passengers, being intended solely for the benefit of the traveling public, a violation of the rule resulting in the death of an employee, is not evidence of the negligence of the defendant in an action founded on the Federal Employers' Liability Act. Topore v. Boston & Maine R. R., — N. H. —, 103 Atl. 72, S. C. 78 N. H. 311, 100 Atl. 153.

A rule of a carrier limiting the speed of all trains to 8 miles an hour while passing a station, being general in character and not shown to be intended solely for the protection of the traveling public, is admissible in evidence in an action under the Federal Employers' Liability Act for the death of an employee who was struck by a train running in violation of such rule. Topore v. Boston & Maine R. R., — N. H. —, 103 Atl. 72, S. C. 78 N. H. 311, 100 Atl. 153.

— Whistle Signals.

A rule relating to whistling signals by trains approaching stations, junctions and railway crossings at yards, held, in an action under the Federal Employers' Liability Act, to be for the safe management and operation of trains and not for the protection of track and signal men. Casey v. Boston & Maine R. Co., — Mass. —, 121 N. E. 403.

(c) Violation by Carrier or Coemployee.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 131, No. 3, p. 137, and Vol. II, p. 97.

Contributing Negligence of Coemployee.

A carrier is liable under the Federal Employers' Liability Act for the death of an engineer in a collision, although his train was running, contrary to rules, on the time of the belated colliding train, if the engineer of the latter did not use such precaution as an ordinarily prudent person would have used under like circumstances to avert the collision, if he had a clear chance to do so, after he actually discovered the peril of the decedent. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

Failure of Conductor to Stop Train on Engineer Disobeying Orders.

Where the conductor, brakeman, engineer and fireman of a freight train were all instantly killed in a collision, there can be no recovery under the Federal Employers' Liability Act for the death of the engineer on the theory of the negligence of his coemployee in failing to take the necessary steps, as required by the rules of the carrier, to stop the train when the engineer ran past a meeting point in violation of his orders with which his companions were familiar. Virginian R. Co. v. Linkous, 144 C. C. A. 386, 230 Fed. 88, S. C. 148 C. C. A. 543, 235 Fed. 49, 155 C. C. A. 504, 242 Fed. 916, certiorari denied 242 U. S. 630, 61 L. ed. 537, 37 Sup. Ct. Rep. 15, and 245 U. S. 649, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

(d) Violation by Injured Employee.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 132, No. 3, p. 137, No. 4, p. 48, and Vol. II, p. 97.

Violation of Rule by Injured Employee.

An engineer cannot recover under the Federal Employers' Liability Act for injuries sustained in a collision brought about by his own negligence in violating rules of a railway company, where he knew of the physical conditions in time to have avoided the accident if he had obeyed the rules. Rash v. Atchison, Topeka & Santa Fe R. Co.,— Kan. —, 173 Pac. 1066.

Running on Time of Belated Train.

There cannot be a recovery under the Federal Employers' Liability Act for the death of an engineer while running his train, at the direction of the conductor but contrary to the rules of the defendant, on the time of a belated train with which there was a collision. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

When Habitual Disregard of Rules. — In General.

When the contributory negligence of an employee in violating a rule of the defendant is urged as a defense to an action under the Federal Employers' Liability Act, the plaintiff may show the customary violation of such rule by servants to the knowledge of the defendant. Hudson v. Seaboard Air Line R. Co., — N. C. —, 97 S. E. 388.

—Blue Flag Rule.

A verdict for the plaintiff affirmed in an action under the Federal Employers' Liability Act for the death of a car inspector by the movement of a train between the cars of which he went at night in the discharge of his duties without first displaying a blue light, where those in charge of the train knew that the "blue light" rule had not been observed for months. Dutton v. Atlantic Coast Line R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion 245 U. S. 673, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

—Boarding Moving Trains.

A railway company is not absolved from liability under the Federal Employers' Liability Act for the death of a car inspector who, in a railway yard contrary to a rule of the carrier, attempted to board moving cars to ride to his work, where the evidence showed habitual disregard of such rule to the knowledge of the defendant. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

11. Violation of Municipal Ordinances.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 134.

As evidence of contributory negligence, see infra X, E, 1.

Violation of Speed Ordinance as Evidence of Negligence.

The running of a train at a speed of from 30 to 40 miles an hour through a populous city in violation of a municipal ordinance restricting the speed to 10 miles an hour, is evidence of negligence in an action under the Federal Employers' Liability Act for the death of a servant who was struck by such train. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

12. Negligence of Fellow Servants.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 134-136, No. 3, p. 137, and Vol. II, p. 98.

When question for jury, see infra XIX, C, 3 (q).

See also infra XI.

(c) Liability for Negligence of.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 134, No. 3, p. 137, No. 4, p. 48, and Vol. II, p. 98.

See also infra XI.

In General.

Under the Federal Employers' Liability Act the master is liable for injuries resulting from the negligence of fellow servants. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54.

Proximate Cause.

There cannot be a recovery under the Federal Employers' Liability Act for injuries alleged to have been sustained by

the negligence of a fellow servant, unless it appears that such negligence was the proximate cause of the injury. Carlson v. Chicago Great Western R. Co., 205 Ill. App. 156.

When Negligence of Coemployee Established.

Negligence on the part of a coemployee cannot be found in an action based on the Federal Employers' Liability Act from mere conclusions which are not sustained by the evidence. Washington-S. R. Co. v. Smith 45, App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

As Defense.

The negligence of a fellow servant is not a defense to an action based on the Federal Employers' Liability Act. Rockwell v. Hustis, — N. H. —, 104 Atl. 127.

For What Acts Answerable.
—In General.

A judgment for the plaintiff was affirmed in an action under the Federal Employers' Liability Act for injuries sustained by a hostler in consequence of the negligence of an inspector in moving a smoke deflector without first ascertaining whether the former was in a position of safety. Cincinnati, New Orleans & Texas Pac. R. Co. v. Morgan, — Tenn. —, 201 S. W. 128.

An engineer of a hoist used to coal interstate locomotives, may recover under the Federal Employers' Liability Act for injuries received in consequence of the negligence of coemployees, while the former was repairing the hoist under the immediate supervision of his foreman and superintendent. Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by supreme court.

A carrier is liable under the Federal Employers' Liability Act for injuries sustained by a section hand by the derailment of a motor driven car due to the negligence of the foreman in controlling the speed of the car on a curve. Rockwell v. Hustis, — N. H. —, 104 Atl. 127.

A recovery may be had under the Federal Employers' Liability Act for injuries sustained by an air brake inspector while between cars of an interstate train making necessary repairs, in consequence of the coupling of an engine to the train after the removal of a blue flag, although placed there by another employee who was aware of the plaintiff's position and who agreed to protect the latter, the flag being removed by orders of a yard conductor without ascertaining whether the plaintiff was in a place of safety. Lehigh Valley R. Co. v. Pidcock, — C. C. A. —, 252 Fed. 475.

— Violation of Train Orders.

Negligence on the part of the defendant is shown in an action under the Federal Employers' Liability Act, where an engineer was killed in a collision with a train which he had orders to meet at a station further on. Gulf, Colorado & Santa Fe R. Co. v. Carpenter, —Tex. Civ. App. —, 201 S. W. 270.

Actionable negligence is shown in an action founded on the Federal Employers' Liability Act, where an engineer neglected or refused to stop or slow down his train under orders to do so so that an employee engaged in interstate commerce could board the train, from which, as he attempted to board it, he was thrown by a sudden jerk caused by the negligence of the engineer. Dumphy v. Norfolk & Western R. Co., — W. Va. —, 95 S. E. 863.

— Warning of Presence of Section Men.

The failure of a train dispatcher to notify the crew of an extra train of the whereabouts of a section crew is not actionable negligence under the Federal Employers' Liability Act, where a sectionman was killed in a collision with such train while the section crew was on the way to a point to which, without the knowledge of the dispatcher, they had been directed by their foreman to proceed with a hand car. Williams v. Chesapeake & Ohio R. Co., — Ky. —, 204 S. W. 292.

— Failure to Warn of Narrow Bridge.

The failure of an engineer to warn a brakeman of the approach to a narrow bridge while the latter was leaning from the side of the engine inspecting a hot box, is not actionable negligence under the Federal Employers' Liability Act, where the engineer was not aware that the brakeman would lean out further than the clearance between the side of the engine and the bridge, and when the engineer saw the danger he warned the brakeman and tried to stop the train. Ball v. Northern Pac. R. Co., — Wash. —, 173 Pac. 1039.

— Handling Heavy Box.

Where a servant was injured by the negligence of fellow servants in failing to lift the front end of a casket weighing 1,000 pounds clear of the door sill of a baggage car as they were transferring the casket from one interstate train to another, a judgment for the plaintiff was sustained in an action under the Federal Employers' Liability Act. Davidson v. St. Louis & San Francisco R. Co., — Mo. App. —, 207 S. W. 277.

— Unloading Rails.

The master is liable under the Federal Employers' Liability Act for injuries sustained by a servant from the negligence of a fellow servant while unloading from a car rails intended for use in an interstate railway line. Reed v. Dickinson, — Iowa —, 169 N. W. 673.

— Failure to Repair Brakes of Hand Car.

There may be a recovery under the Federal Employers' Liability Act for injuries received by a servant from a collision of hand cars in consequence of the negligence of a section foreman in failing to seasonably renew the brake shoe linings. Miller v. Ann Arbor R. Co., 196 Mich. 297, 162 N. W. 1025.

— Holding Torch Over Manhole of Oil Tank.

Where, in the performance of his duty of measuring or gauging the quantity of fuel oil pumped into a locomotive tender, a foreman held a flaming torch over the open manhole, and on being warned by a coemployee not to do so, called the latter a coward and immediately passed the torch several times over the open manhole and caused an explosion, the fact that the foreman was guilty of greater recklessness than the performance of his duties required will not relieve the employer of liability under the Federal Employers' Liability Act for the resulting death of the complaining employee. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

— Failure to Warn of Car on Track.

Negligence can be found, in an action based on the Federal Employers' Liability Act, from the conduct of a freight conductor at night in misinforming the brakemen on a moving cut of cars as to the position of a stationary car on a house track, with which the moving cars collided throwing one of the brakemen to the ground and killing him. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375.

— Failure to Keep Lookout.

There may be a recovery under the Federal Employers' Liability Act for the death of a brakeman who at night was thrown from a cut of cars in a collision, caused by the failure of a brakeman at the head of the cut to keep a proper lookout for obstructions on a house track, and the negligence of a conductor in misinforming the brakemen as to the position of a stationary car. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375.

— Failure to Flag Train.

The negligence of a rear brakeman in failing to flag a train as his duty required, will render a railway company liable under the Federal Employers' Liability Act for injuries sustained by the conductor of a work train in a rear end collision, where he relied on the performance by the brakeman of such duty. Eley v. Chicago, Great Western R. Co., — Iowa —, 166 N. W. 739.

A judgment for the plaintiff was sustained in an action based on the Federal Employers' Liability Act, for injuries received by the conductor of a work train in a rear end collision caused by the negligence of his flagman in failing to signal a more rapidly following train to which the train dispatcher failed to give notice of the presence of the work train. Eley v. Chicago Great Western R. Co., — Iowa —, 166 N. W. 739.

— Concurrent Negligence.

There may be a recovery under the Federal Employers' Liability Act for the death of a section man who was struck by a train, where the accident was due to the joint negligence of himself and the engineer of the train. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

A judgment for the plaintiff affirmed in an action under the Federal Employers' Liability Act for the death of a brakeman in a rear end collision, where, although the decedent was guilty of contributory negligence in failing to perform his duty of flagging the following train, which in a heavy snow storm ran past a block signal with knowledge of the proximity of the preceding train, and the train dispatcher was also negligent in holding the decedent's train so that its engine could move the disabled locomotive of another train rather than leaving it for the following train to do. Union Pac. R. Co. v. Hadley, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 318, affirming 99 Neb. 349, 156 N. W. 765.

14. Safe Place.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 137, and Vol. II, pp. 99-101.

(b) Tracks.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 137, and Vol. II, p. 100.

Slipping on Rotten Cross-Tie.

Actionable negligence under the Federal Employers' Liability Act is not shown where a railway employee was injured by his foot slipping between two ties in consequence of a small piece of rotten wood in one of them giving away when he stepped on it, where neither the condition of the tie nor the failure to ballast be-

tween the ties were defects impairing the safe use of the track by trains. Nelson v. Southern R. Co., 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 233, affirming 170 N. C. 170, 86 S. E. 1036.

Narrow Bridge.

The fact that there was a clearance of but two feet between the side of a train and the braces of a bridge, which struck and killed a brakeman, does not show negligence in an action based on the Federal Employers' Liability Act. Ball v. Northern Pac. R. Co., —Wash.—, 173 Pac. 1029.

(e) Structures Near Track.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 138, and Vol. II, p. 100.

Mail Crane.

Where an engineer, while leaning 14 inches from the side window of the cab of a locomotive in the discharge of his duties, was struck and injured by some part of a mail crane beside the track, a judgment in his favor under the Federal Employers' Liability Act was sustained. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323.

(f) Cars Not in Clear.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 138, Vol. II, p. 100.

In General.

A judgment for the plaintiff affirmed in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman who, in stepping from a slowly moving engine in the night time, collided with a car which was not in the clear on a sidetrack. Mills v. Roberts, — Ark. —, 206 S. W. 751.

(n) Ways and Paths.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 140.

When negligence jury question, see infra XIX, C, 3 (j).

Approach to Switches.

No liability under the Federal Employers' Liability Act is shown by the fact that a brakeman was injured as the result of the failure of a railway company to construct a path or special walk leading to a switch for the use of employees who had to operate the switch. Western Maryland R. Co. v. Sanner, 130 Md. 581, 101 Atl. 587, certiorari denied 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

The fact that the ends of the ties at the outer side of a curved track were higher than those at the other end does not show the negligence of the defendant in an action under the Federal Employers' Liability Act for injuries received by a brakeman who jumped from a moving locomotive to throw a switch, and who was injured in consequence of the condition of the track at the outer side of the curve. Western Maryland R. Co. v. Sanner, 581 Md. 581, 101 Atl. 587, certiorari denied 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

Obstructions in Path Between Tracks.

The doctrine of safe place applies where tracks in a railway yard on a smooth, level a car inspector, while boarding a train, was injured by stumbling over a jack block which was negligently left between the tracks in a railway yard on a smooth, level cinder path which, for the use of employees, was ordinarily kept free from obstructions. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

15. Defective Appliances and Tools.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 140-142, No. 3, p. 138, and Vol. II, p. 101.

When negligence respecting question for jury, see infra XIX, C, 3 (i).

Defective Electric Lamp.

A judgment for the plaintiff was sustained in an action founded on the Federal Employers' Liability Act for the death of a servant in consequence of using a defective electric lamp which the master required to be used for a week after notice of its condition. Ennis v. Yazoo & Mississippi Valley R. Co., — Miss. —, 79 So. 73.

Defective Appliances of Boat.

In order to recover under the Federal Employers' Liability Act for the death of a servant of an interstate carrier when employed on a lighter used in interstate commerce, in the absence of negligence on the part of the decedent or fellow servants, the accident must have been due to some defect or insufficiency in the lighter resulting from the master's negligence. The Erie Lighter 108, 250 Fed. 490.

When the captain of a lighter was killed by the pulling off of the corner piece to the cap of a log rail of a boat used in interstate commerce by a railway engaged therein, there may be a recovery under the Federal Employers' Liability Act where the carrier should have discovered the defect when repairs were made a short time before the accident. The Erie Lighter 108, 250 Fed. 490.

(b) Engines.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 140, and Vol. II, p. 101.

Coal on Footboard.

Where a switchman was killed at night while stepping on a slowly moving switch engine by slipping on loose coal which was negligently left on the footboard by a hostler who coaled the engine, the master is liable under the Federal Employers' Liability Act. Castle v. Union Pac. R. Co., — Minn. —, 166 N. W. 767.

(e) Tools.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 141, No. 3, p. 138, and Vol. II, p. 101.

Duty to Exercise Care in Providing.

The nonassignable duty of a master to exercise reasonable care in providing an employee with safe tools and appliances with which to perform the work required of him, was not affected by the Federal Employers' Liability Act. Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604, affirming 215 Fed. 285, certiorari denied 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

Defective Trip Hammer.

A judgment for the plaintiff was sustained in an action founded on the Federal Employers' Liability Act for injuries received by a shop employee while using a defective trip hammer. Southern Pac. Co. v. De La Cruz, — Tex. Civ. App. —, 201 S. W. 428.

Defective Claw-bar.

A servant who was injured while drawing bolts from a bridge with a defective claw-bar, was held entitled to recover under the Federal Employers' Liability Act, for the negligence of the master in providing such a tool. Williams v. Pryor, — Mo. —, 200 S. W. 53, certiorari denied 246 U. S. 660, 62 L. ed. 926, 38 Sup. Ct. Rep. 332.

17. Movement of Engines and Cars.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 142-148, No. 3, p. 15, No. 4, p. 48, and Vol. II, pp. 102, 103.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 142, No. 3, p. 138, and Vol. II, p. 102.

Boarding Moving Cars.

There cannot be a recovery under the Federal Employers' Liability Act for the death of an employee as the result of attempting to board moving cars where he had ample opportunity to do so in safety before they were set in motion. York v. Southern Pac. Co., — Oreg. —, 170 Pac. 927, rehearing denied 171 Pac. 567.

There can be no recovery under the Federal Employers' Liability Act for the death of an employee who was killed while attempting to board moving cars when about to make a flying switch, when it does not appear that it was incumbent on him to do so, or that any duty was required of him in making such movement. York v. Southern Pac. Co., — Oreg. —, 171 Pac. 567, denying rehearing to 170 Pac. 927.

A judgment for the plaintiff upheld in an action under the Federal Employers' Liability Act for injuries sustained by a telegraph operator from the giving away of a handhold of a car of a moving freight train he attempted to board to go to his place of work. Baltimore & Ohio R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 335.

Injuries Sustained While Coupling Cars.

There is no liability under the Federal Employers' Liability Act for injuries sustained by an experienced brakeman while on the footboard of a slowly moving engine making a coupling on a curved track with coupling equipment in perfect condition and adjusted in the customary manner, when at the crucial moment a contingency arose incident to the hazard of his employment, and as he attempted to push the coupling into alignment with his foot, he slipped and was injured. Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Negligence on the part of the defendant is not shown in an action founded on the Federal Employers' Liability Act for injuries sustained by an employee when about to make a coupling from the footboard of an engine moving 4 miles an hour when about 10 feet from the car to which a coupling was to be made, where the evidence does not disclose the speed of the engine at the point where the coupling was made. Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Backing Engine Past Station.

Where, while transferring mail across a track from one train to another at a station, a servant was struck and killed by a backing engine, no warning being given of its approach and it being hidden by smoke and steam, a judgment for the plaintiff was sustained in an action under the Federal Employers' Liability Act.

Hudson v. Seaboard Air Line R. Co., — N. C. —, 97 S. E. 388.

Running Engine Without Headlight.

The fact that at the time a conductor was injured in a collision his train was running without a headlight in violation of a state law, did not make him a trespasser to whom the railway owed no duty other than to refrain from willfully injuring him, so as to prevent a recovery under the Federal Employers' Liability Act, since at most the conductor was guilty of contributory negligence only. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

Moving Cars by Gravity on Main Track.

It was held gross negligence, in an action under the Federal Employers' Liability Act for the death of the engineer of a passenger train in a collision with a loaded freight car, for the defendant to put the car in motion by gravity at the top of a grade on a main track at a time when the passenger train was due. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed., 36 Sup. Ct. Rep. 513.

Obeying Command.

A judgment for the plaintiff sustained in an action under the Federal Employers' Liability Act for injuries received by a telegraph lineman while attempting, in the line of duty, to board a moving train, in compliance with a direct order of his superior. Vandalia R. Co. v. Kendall, — Ind. App. —, 119 N. E. 816.

Backing Trains.

A verdict for the plaintiff cannot be sustained under the Federal Employers' Liability Act for the death of a switchman who at night was struck by a backing train where the defendant complied with a long established rule or custom requiring a person to be posted at the center of the leading car with a lantern to give warning to those who might be on the track. Atlantic Coast Line R. Co. v. Selden, — C. C. A. —, 249 Fed. 122.

(d) Lookout and Warning Signals.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 143, No. 3, p. 138, and Vol. II, p. 102.

Failure to give warning as jury question, see infra XIX, C, 3 (w).

In General.

There cannot be a recovery under the Federal Employers' Liability Act for injuries sustained by an experienced section hand who was struck by a regular train running on schedule time, as he was crossing a track at a curve, although the view was somewhat obstructed by weeds, where warning signals were given in time to permit him to escape danger. Sierzchula v. Chicago & Alton R. Co., 209 Ill. App. 15.

Lookout for Trackwalker.

The Federal Employers' Liability Act does not require a train crew to keep a lookout at night for employees patrolling a track looking for landslides. Louisville & Nashville R. Co. v. Seeley, — Ky. —, 202 S. W. 638.

Failure to Sound Whistle as Negligence.

Even if a statute requiring engineers to sound the whistle for highway crossings is for the benefit of servants of the carrier as well as for the general public, the failure to do so cannot be held negligence per se in an action under the Federal Employers' Liability Act for the death of a section man. Baird v. Northern Pac. Co., — Wash. —, 170 Pac. 1016.

An order of a railway company requiring engineers to sound whistles around curved cuts has the same effect as a statute, and the company is answerable under the Federal Employers' Liability Act for the death of a section man as the result of the failure of an engineer to sound the whistle in time to avert a collision with a hand car. Baird v. Northern Pac. R. Co., — Wash. —, 170 Pac. 1016.

Failure to Give Seasonable Warning.

A judgment for the plaintiff sustained in an action under the Federal Employers' Liability Act, where a trackwalker on an interstate railway line, when suddenly warned of the approach of a passenger train from the rear, was killed by a train on a parallel track onto which he stepped, where the evidence tends to show that the engineer of the passenger train was negligent in failing to give the decedent warning in time to permit him to seek a place of safety. Santomassimo v. New York, Susquehanna & Western R. Co., — N. J. —, 105 Atl. 14.

Backing Engine Past Station.

Backing an engine at a station without a lookout on the rear and without giving notice of its approach, which was obscured by steam and smoke, along a track over which employees and others were accustomed to pass, held negligence in an action under the Federal Employers' Liability Act for the death of a servant who was killed while crossing the track transferring mail from one train to another. Hudson v. Seaboard Air Line R. Co., — N. C. —, 97 S. E. 388.

(e) Excessive Speed.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 145.

As Negligence.

No particular rate of speed of a train can be held to constitute negligence per se in an action under the Federal Employers' Liability Act, although high speed may become negligence under the particular circumstances of a case. Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101.

(f) Failure to Observe Signals.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 146.

Stop Signal.

A judgment for the plaintiff affirmed in an action under the Federal Employers' Liability Act for the death of a brakeman in consequence of the sudden movement of cars when struck by others as the result of the negligent failure of an engineer to obey slow down and stop signals. Winne v. Erie R. Co., — N. Y. —, 118 N. E. 1081, affirming 169 App. Div. 960, 153 N. Y. Supp. 1150.

Failure to Obey Order to Stop Train for Servant.

A railway company is negligent, within the contemplation of the Federal Employers' Act, when its engineer refuses or neglects to obey the order of his superior officer to stop or slow down at a particular point and pick up an employee engaged in interstate commerce who has knowledge of such order and is relying thereon, so as to injure him in boarding the moving train, or if the engineer so negligently manages his engine and train as to do an injury to such employee lawfully thereon. Dumphy v. Norfolk & Western R. Co., — W. Va. —, 95 S. E. 863.

(h) Kicking Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 147, No. 3, p. 139, No. 4, p. 48, and Vol. II, p. 103.

Against Other Cars.

A judgment for the plaintiff, in an action under the Federal Employers' Liability Act, sustained for injuries received by a switchman when a car on which he was standing at night, was struck by a shunted car which was permitted to move without an attendant. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

The direction of a verdict for the defendant affirmed by a divided court, in an action under the Federal Employers' Liability Act for the death of a switchman who was struck by a shunted car which was set in motion by kicked cars. Martin v. Chicago, Milwaukee & St. Paul R. Co., 162 Wis. 595, 156 N. W. 1087, affirmed without opinion 246 U. S. —, 62 L. ed. 38 Sup. Ct. Rep. 333.

Shunted Cars Colliding With Car on Repair Track.

A judgment for the plaintiff sustained in an action under the Federal Employers' Liability Act, for the death of a switchman while riding shunted cars on a foggy night, which collided with a loaded car left standing on a repair track. Cincinnati, New Orleans & Texas Pac. R. Co. v. McGuffey, — C. C. A. —, 252 Fed. 25.

(g) Starting or Stopping With Unnecessary Violence.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 146, and Vol. II, p. 103.

Negligence in violent or unusual movement of cars as question for jury, see infra XIX, C, 3 (v).

Violent Stops.

A judgment for the plaintiff was affirmed in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman who was thrown from his seat in the cupola of a caboose by the sudden stopping of a freight train with unnecessary and unreasonable violence. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

A brakeman may recover under the Federal Employers' Liability Act for injuries sustained from the negligence of an engineer in suddenly stopping cars in an unusual and unnecessary manner in making a flying switch. Jones v. Norfolk Southern R. R. Co., — N. C. —, 79 S. E. 48.

A judgment for the plaintiff sustained in an action founded on the Federal Employers' Liability Act from injuries sustained by the conductor of a freight train in consequence of a "snap shot" or "undesired emergency" application of the air brakes. Scott v. Atlantic Coast Line R. Co., — S. C. —, 96 S. E. 305.

Under the Federal Employers' Liability Act a carrier is answerable for injuries caused a servant from the shock sustained from the too sudden stopping of a train. Louisville & Nashville R. Co. v. Wright, — Ala. —, 80 So. 93.

VIII. PROXIMATE CAUSE.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 149-152, No. 3, p. 139, and Vol. II, p. 104.

When jury question, see infra XIX, C, 3 (t).

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 149, No. 3, p. 139, and Vol. II, p. 104.

When One of Acts Alleged Cause of Injury.

It is not necessary that all of the acts charged as negligence in an action based on the Federal Employers' Liability Act, should have caused or contributed to the injury of a servant, where such acts are of a nature that any one of them or combination of them, might be found to be the proximate cause of the accident. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

Concurrent Negligence.

In an action under the Federal Employers' Liability Act for the death of a section hand who was struck by a train, the proximate cause was held to be the negligence of the decedent in walking on the track and of the engineer of the train in not giving proper warning signals. Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101.

B. Negligence of Fellow Servants.

See also same section Federal Ry. Digest, Vol. 3, No. 2, p. 150, and Vol. II, p. 104.

(No new decisions.)

C. Defective Appliances.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 151.

(No new decisions.)

D. Safe Place.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 151-152, and Vol. II, p. 104.

1. In General.

Concurring Causes.

Where a car inspector in boarding a moving car stumbled over a jack block which was negligently left between the tracks in a railway yard and he was thrown against a stationary car on another track and by the impact was thrown back under the moving train, both the presence of the jack block and the stationary car were concurring causes, and the presence of such car was not such an independent intervening cause as will relieve the defendant from liability under the Federal Employers' Liability Act. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Failure to Maintain Lights About Station.

The proximate cause of an injury to a station master of an interstate railway, who was struck by a robber, was held, in an action under the Federal Employers' Liability Act, to be the act of the robber rather than the failure of the carrier to keep all the lamps lighted about the station, since the want of light was a condition which might or might not have influenced the assault. Carter v. Atlantic Coast Line R. Co., — S. C. —, 95 S. E. 357.

E. Acts of Injured Employee.

When Sole Cause of Injury.

It cannot be said in an action under the Federal Employers' Liability Act, that the sole proximate cause of the death of a brakeman in a rear end collision, was his own neglect of duty in failing to flag the following train, which ran past a block signal, where the train would not have been in such close proximity but for the negligence of the train dispatcher. Union Pac. R. Co. v. Hadley, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 318, affirming 99 Neb. 349, 156 N. W. 765.

F. Movement of Trains.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 152.

(No new decisions.)

IX. ASSUMED RISK.

See generally the same section Federal Ry. Digest, Vol. I, No. 2, pp. 152-168, No. 3, pp. 139-142, No. 4, p. 149, and Vol. II, pp. 105-112.

Directing verdict for assumed risk, see infra XIX, G, 6.

Distinction between assumed risk and contributory negligence, see infra X, A, and E. 1 and 5.

Granting nonsuit for assumed risk, see infra XIX, F, 1.

When assumed risk question for jury, see infra XIX, C, 3 (c).

A. In General.

See also same section Federal Ry. Digest, Vol. II, p. 105.

What Law Governs State Courts in Determining Assumption of Risk.

The question of assumed risk in an action founded on the Federal Employers' Liability Act, is to be determined in a state court by the provisions of such law and the common law as recognized and construed by the Federal courts. Har-

grove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

Assumption of risk is a substantive defense in an action in a state court under the Federal Employers' Liability Act, rather than a matter of procedure or rule of evidence, hence the Federal act and the decisions of the Supreme Court of the United States thereunder constitute the substantive law on the subject, although the procedure is that of the forum. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

The doctrine of assumed risk, as it is known to the common law and as it has been construed by the Federal courts, must govern an action in a state court based on the Federal Employers' Liability Act, except when some provision thereof made for the benefit of employees, is violated by the defendant. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

Recovery Without Negativing Assumed Risk.

Where, after the sustaining of a demurrer to a declaration in action under the Federal Employers' Liability Act because it did not negative assumption of risk, the plaintiff filed an amended declaration which omitted to allege his want of knowledge or facts relieving him of assumed risk, it will be presumed that the omission was not only designedly made, but also that he relied upon his right to recover, notwithstanding his knowledge of the defects and assumption of the risk. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

B. Effect of Federal Act on Common-Law Rule.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 152, No. 3, p. 139, and Vol. II, p. 105.

In General.

Assumed risk is still a defense to an action based on the Federal Employers' Liability Act. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

In abrogating the defense of assumption of risk in certain cases Congress indicated the legislative intent that in all other cases under the Federal Employers' Liability Act, such defense should have its former effect as a complete bar to the action. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

Under the Federal Employers' Liability Act the rule of assumption of risk is that of the common law as it existed prior to the passage of said act, except where the carrier violates the provisions of some statute enacted for the safety of employees. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, —Okla. —, 170 Pac. 1161.

Under the Federal Employers' Liability Act when the negligence for which damages are sought does not amount to a violation of the terms of the Federal Safety Appliance Act, the defense of assumed risks at common law is left intact. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

Assumed risk is a defense to an action based on the Federal Employers' Liability Act. Gulf, Colorado & Santa Fe R. Co. v. Drennan, — Tex. Civ. App. —, 204 S. W. 691.

Under the terms of the Federal Employers' Liability Act assumed risk is the same as at common law as recognized and construed by the Federal courts. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323.

C. Violation of Safety Statutes.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 153, No. 3, p. 139, No. 4, p. 49, and Vol. II, p. 105.

1. In General.

In General.

The Federal Employers' Liability Act leaves unimpaired the common-law defense of assumed risk, except in cases where the injury complained of was caused by a violation by an employer of some of the provisions of the act made for the benefit of employees. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

Under the Federal Employers' Liability Act assumed risk as a defense is abolished only in cases where the violation by a carrier of a statute enacted for the safety of employees contributes to or causes the injury or death of a servant. Vandalia R. Co. v. Kendall, — Ind. App. —, 119 N. E. 816.

Assumed risk as a defense to an action based on the Federal Employers' Liability Act is abolished only where the defendant has violated some statute enacted for the safety of employees. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

2. Federal Statutes.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 153, No. 3, p. 139, No. 4, p. 49, and Vol. II, p. 105.

(a) In General.

In General.

The defense of assumed risk is available in an action under the Federal Employers' Liability Act when no violation by the defendant of any Federal statute enacted for the safety of employees is shown. Carlson v. Chicago Great Western R. Co., 205 Ill. App. 156.

Assumed risk is a defense to an action founded on the Federal Employers' Liabil-

ity Act the same as at common law, except when the violation by the defendant of some Federal statute enacted for the protection of employees contributes to the injury. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517; Bradley v. Vandalia R. Co., 207 Ill. App. 592.

Boiler Inspection Act.

The Federal Boiler Inspection Act was passed for the safety of employees, within the meaning of section 4 of the Federal Employers' Liability Act providing that servants shall not be deemed to have assumed the risk of their employment in any case where the violation by a carrier of any statute enacted for the safety of employees contributes to the injury or death of a servant. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

(b) Safety Appliance Act.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 154, No. 3, p. 139, and No. 4, p. 49.

See general Safety Appliance Act, Federal, infra.

Violation of Safety Appliance Act.

The question of assumed risk is eliminated from an action under the Federal Employers' Liability Act where an employee's injuries are due to the failure of the defendant to comply with the Safety Appliance Act. Chicago, R. I. & G. R. Co. v. De Bord, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667. certiorari denied 245 U. S. 652, 62 L. ed. —, 38 Sup. Ct. Rep. 12; Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333; Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

D. What Risks Assumed.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 155-168, No. 3, pp. 139-142, No. 4, p. 49, and Vol. II, pp. 106-112.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 155, No. 3, p. 139, No. 4, p. 49, and Vol. II, p. 106.

Defects in Appliances and Road.

The doctrine of assumed risk is not abrogated by the Federal Employers' Liability Act in so far as it relates to injuries resulting from defects or insufficiencies in the cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, or equipment of an interstate railway. Atlantic Coast Line R. Co. v. Tomlinson, — Ga. App. —, 94 S. E. 909.

Risks of Employment.

Under the Federal Employers' Liability Act the common-law doctrine that a railway employee assumes the risks, dangers, and hazards normally incident to the business, still obtains. King v. Norfolk & Southern R. Co., — N. C. —, 79 S. E. 29.

One suing under the Federal Employers' Liability Act is held to assume the risk of his employment, but that does not include risks incident to the negligence of the defendant's agents, employees, or officers. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

In an action based on the Federal Employers' Liability Act a servant is chargeable with assumption of all ordinary risks of his employment of which he is aware, or which would, under like circumstances, have been known to a person of reasonable prudence and diligence by the exercise of ordinary care. Chicago, Rock Island & Pacific R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

Under the Federal Employers' Liability Act a sectionman assumes the ordinary risks of his employment, including the danger of encountering trains while using a hand car. Atlantic Coast Line R. Co. v. Tomlinson, — Ga. App. —, 94 S. E. 909.

Under the Federal Employers' Liability Act a servant assumes all the ordinary risks of his employment which are known to him, or which could, under like circumstances, have been known by the exercise of ordinary care to a person of reasonable prudence and diligence. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

Under the Federal Employers' Liability Act a servant assumes all ordinary risks of his employment as well as of such extraordinary risks of which he is aware or which he ought to know and appreciate. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

Under the Federal Employers' Liability Act a servant assumes the risks normally incident to his occupation, but not other and extraordinary ones. King v. Norfolk & Southern R. Co., — N. C. —, 79 S. E. 29.

Under the Federal Employers' Liability Act a servant assumes the risks necessarily incident to his employment. Louisville & Nashville R. Co. v. Wright, — Ala. —, 80 So. 93.

2. Negligence of Employer.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 157, No. 3, p. 140, and Vol. II, p. 107.

When Risk of Assumed.

Under the Federal Employers' Liability Act a servant does not assume risks of injury due to the master's negligence,

until made aware thereof, or until they become so obvious and immediately dangerous that they would be observed and appreciated by an ordinarily prudent person. King v. Norfolk & Southern R. Co., —N. C. —, 79 S. E. 29.

Under the Federal Employers' Liability Act a servant does not assume the risk of injury from the negligence of the master, unless the former is given fair opportunity to know and appreciate the risk to which such negligence subjects him. Jones v. Norfolk Southern R. Co., — N. C. —, 79 S. E. 48.

Under the Federal Employers' Liability Act a servant assumes all ordinary risks of injury arising from the negligence of his employer, which are known to him, or which would have been known to a person of reasonable prudence and diligence by the exercise of ordinary care. Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

Risks which are not ordinarily incident to a railway employee's occupation, but which arise from the negligence of the master, are not, under the Federal Employers' Liability Act, assumed by the former until he becomes aware of such negligence and of the risk arising therefrom, unless it is so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

A railway employee assumes, under the Federal Employers' Liability Act, risks of injury arising from the negligence of the master after the former becomes aware thereof, or when the danger is so apparent and obvious that an ordinary careful person would observe the one and appreciate the other. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

An electrical engineer employed to instruct the motormen of an interstate railway how to operate motors, while so engaged assumes all the ordinary risks of his employment, including the risk of mounting and riding moving trains; but he does not assume the extraordinary risks and hazards resulting from the negligence of the railway company, or those for whom it becomes responsible, as he has the right to assume that his employer will not subject him to such extraordinary risks and hazards, and he may act on this assumption, unless the risks and hazards are so open and apparent as to cause a man of ordinary prudence to see and appreciate them. Dumphy v. Norfolk & Western R. Co., — W. Va. —, 95 S. E. 863.

Obeying Commands.

A servant cannot be charged with assumption of risk in an action based on the Federal Employers' Liability Act for injuries sustained while obeying a command of the master or his agent having authority to direct work, unless the danger is so great and imminent that a reasonably prudent person would not have assumed it. Vandalia R. Co. v. Kendall, — Ind. App. —, 119 N. E. 816.

3. Negligence of Fellow Servants.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 157, No. 3, p. 140, and Vol. II, p. 107.

Not an Assumed Risk.

One suing under the Federal Employers' Liability Act does not assume the risk of injury from the negligence of the defendant's officers, employees, or agents. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

The negligence of fellow servants is not a risk which is assumed under the Federal Employers' Liability Act. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375; Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by Supreme Court; Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408; Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101.

The unexpected negligence of fellow-servants is not a risk which an employee assumes under the Federal Employers' Liability Act. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

The doctrine of assumed risk is not abrogated by the Federal Employers' Liability Act in so far as it relates to injuries resulting in whole or in part from the negligence of the officers, agents, or employees of an interstate railway company. Atlantic Coast Line R. Co. v. Tomlinson, — Ga. App. —, 94 S. E. 909.

The risk of injury from the negligence of a fellow servant is not one which is assumed under the Federal Employers' Liability Act. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

A servant working about a dead wire does not, under the Federal Employers' Liability Act, assume the risk of injury from a fellow servant turning on a current of electricity of high voltage, unless the former was aware that the wire was charged or the danger was obvious to a person of ordinary prudence. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

Under the Federal Employers' Liability Act the negligence of fellow servants is not an assumed risk. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54; Reed v. Dickinson, — Iowa, —, 169 N.

W. 673. Santomassimo v. New York, Susquehanna & Western R. Co., — N. J. —, 105 Atl. 14.

Particular Acts of Coemployees.

— Holding Torch Over Manhole of Oil Tank.

An employee who, while assisting in filling a locomotive tank with fuel oil, was killed by an explosion, was held, in an action under the Federal Employers' Liability Act, not to have assumed the risk of his foreman's using a flaming torch over the open manhole of the oil tank. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

4. Defective Appliances.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 159-160, No. 3, p. 140, and Vol. II, p. 108.

(a) In General.

See also same section Federal Ry. Digest, Vol. II, p. 108.

Defective Turntable Motor.

When a roundhouse helper attempted to move a turntable by hand on the failure of the electric motor to operate, and he was injured by the sudden starting of the motor because the electric current was not cut off, of which he was not aware, he did not assume the risk of injury so as to defeat a recovery under the Federal Employers' Liability Act. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

When a roundhouse helper is legally chargeable with knowledge of some of the defective conditions of an electric device used to move a turntable, and of the danger of injury incident thereto, he cannot recover under the Federal Employers' Liability Act for an injury sustained by the sudden starting of the motor while he was attempting to move the table by hand, even though the defendant negligently failed to warn the plaintiff of any and all dangers to which he was exposed. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

Where a roundhouse helper attempted to move a turntable by hand on the failure of the electric motor to work, knowing that no one was in charge to shut off the electric current so as to stop the motor if necessary, he was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the sudden starting of the motor. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

A roundhouse helper assumed the risk of injury, in an action under the Federal Employers' Liability Act, in consequence of the defective condition of an electric device for moving a turntable, although it was complicated and he did not understand it, where he knew or must necessarily have known from previous observation in the operation of the motor, that it was defective and in a dangerous condition. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

The fact that a roundhouse helper attempted to move a turntable by hand in obedience to the orders of his foreman when the electric device failed to work, that the former was injured when the motor suddenly started because, without knowledge to him, the current had not been cut off, and that he did not have time to appreciate the danger, will not prevent him being charged with assumed risk in an action under the Federal Employers' Liability Act. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

In an action under the Federal Employers' Liability Act a roundhouse helper was held to have assumed the risk of injury, where, for more than two years, he worked about a turntable with the hand lever and the electric motor in the same alleged defective condition as on the night he claimed it caused his injury, and the same unlighted condition had prevailed for several months. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

Head Flying From Spike.

The risk of injury from the head flying from a spike when struck by a maul, was held, in an action based on the Federal Employers' Liability Act, to be an incident usual to the employment of a section hand and one which he assumed. Ruping v. Oregon Short Line R. Co., — Utah, —, 171 Pac. 145.

(b) Engines and Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 159, No. 3, p. 140, and Vol. II, p. 108.

Failure of Inspector to Discover Defects.

In an action under the Federal Employers' Liability Act a car repairer is chargeable with assumed risk, when injured by the falling of a defective drawbar, the condition of which a car inspector failed to discover and note on the "bad order" card attached to the car. Sims v. Minneapolis, St. Paul & S. S. M. R. Co., — Mich. —, 162 N. W. 988.

(c) Tools.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 160, No. 3, p. 140, and Vol. II, p. 108.

Failure to Provide.
— "Deadman" for Pole Raising.

A telegraph lineman cannot be held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from the failure of his master to furnish a "deadman" for use in raising poles, where the former was assured by his foreman, when he requested him to provide such implement, that it was not necessary for the decedent's safety. Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604, affirming 215 Fed. 285, certiorari denied 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

Defective Tools and Appliances.

The risk of injury from lifting a heavy track with a bent or crooked pry bar is assumed, under the Federal Employers' Liability Act, since the device is a simple instrument or tool. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

Under the Federal Employers' Liability Act the captain of a lighter employed in interstate commerce by a railway engaged therein, does not assume the risk of injury from the negligence of the master in providing a defective cap to a rail log, where there is nothing to show that the servant knew or should have known of the defect. The Erie Lighter 108, 250 Fed. 490.

Simple Tools.

Under the decisions of the Missouri courts a servant cannot, in an action under the Federal Employers' Liability Act, be charged with assumption of the risk of injury from using a defective tool, however simple the tool or obvious the defect, but the use thereof is contributory negligence. Williams v. Pryor, — Mo. —, 200 S. W. 53, certiorari denied 246 U. S. 660, 62 L. ed. 926, 38 Sup. Ct. Rep. 332.

5. Unsafe Place.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 161-164, No. 3, p. 141, and Vol. II, pp. 108-110.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 161-164, No. 3, p. 141, and Vol. II, p. 108.

Boilermaker Remaining in Tank Until Made Deaf.

In an action under the Federal Employers' Liability Act for deafness caused by noise, a boilermaker's helper assumes the ordinary risks incident to his employment, but not from remaining in the tank of a locomotive for an unreasonable length of time under the orders of his superior, holding a heavy piece of iron against rivet heads while an air hammer was applied to them from the outside of the tank. Martinson v. Chicago, Burlington & Quincy R. Co. — Neb. —, 166 N. W. 624.

Rails Falling From Car.

An employee on a work train which was being rapidly moved to a siding to escape an approaching passenger train, cannot be said, as a matter of law, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from rails falling from a car, on which he was seated, in consequence of the failure of the defendant to place in the sockets in the side of the car standards 6 or 7 inches high, as was usually, done to prevent the rails so plainly observable that the plaintiff from falling, since their absence was not must be conclusively presumed to have noticed it. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

Opening in Carload of Lumber.

In an action under the Federal Employers Liability Act a servant assumes the risk of injury from falling into an open space in a car load of lumber, covered by boards which shifted over the opening in consequence of rough handling of the car. Gulf, Colorado & Santa Fe R. Co. v. Drennan, — Tex. Civ. App. —, 204 S. W. 691.

Unblocked Guard Rail.

A brakeman of eleven years' experience who was familiar with the conditions in the railway yard where he worked, and who knew the location of an unblocked guard rail, assumed the risk of injury from catching his foot therein. Gaddy v. North Carolina R. Co., —N. C.—, 95 S. E. 925.

(d) Obstructions Near to or Above Tracks.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 161, No. 3, p. 141, and Vol. II, pp. 109, 110.

Obstruction in Path Between Tracks.

A car inspector does not, under the Federal Employers' Liability Act, assume the risk of injury while attempting to board a moving train, from stumbling over a jack block, of the presence of which he was unaware, which was negligently left in a path between two tracks in a railway yard. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552. certiorari denied

246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Uneven Ground About Switch.

When a brakeman during the daytime jumped from a moving engine to throw a switch and was injured in consequence of a hole or unevenness beside the track which he might have seen before he left the locomotive, he is chargable with assumption of the risk in an action based on the Federal Employers' Liability Act. Western Maryland R. Co. v. Sanner, 130 Md. 581, 101 Atl. 587, certiorari denied 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

Coal Bins Close to Track.

Under the Federal Employers' Liability Act, a brakeman assumes the risk of injury from the construction of coal bins in too close proximity to a track where he had actual knowledge of the defective construction prior to his injury. Chicago, Rock Island & Gulf R. Co. v. DeBord, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667, certiorari denied 245 U. S. 652, 62 L. ed. —, 38 Sup. Ct. Rep. 12.

Mail Crane Too Close to Track.

Where an engineer, while leaning 14 inches from the side window of the cab of a locomotive, was struck and injured by some part of a mail crane beside the track, it cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that he assumed the risk of injury from the negligent placing of the crane too close to the track although he was aware thereof. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323.

Freight Platform Close to Track.

A switchman held not chargeable, in an action under the Federal Employers' Liability Act, with notice of the condition of danger where he was caught between the outer edge of a curved platform and the side of an extraordinary long car, there being a clearance of but five inches between them. Northern Trust Co. v. Grand Trunk R. Co., 207 Ill. App. 11.

6. Movement of Trains and Cars.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 164-166, No. 3, p. 141, No. 4, p. 49, Vol. II, p. 110.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 164, No. 3, p. 141, No. 4, p. 49, and Vol. II, p. 110.

Agreement to Assume Risk.

A telegraph operator to whom a railway company gave a permit to use a "speeder" in going to and from his work, does not assume the risk of injury from being struck by a train, although he agreed to assume all risks of injury, since that was in violation of section 5 of the Federal Employers' Liability Act as a contract relieving the carrier from the liability created by the act. Cavanaugh v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 10 Ohio N. P. (N. S.) 169.

Train Running Against Current of Traffic.

That a section man assumed the risk of injury from being struck by a west bound train running through a populous city at a high rate of speed on an east bound track, without a proper lookout being kept or appropriate signals being given, is not shown in an action under the Federal Employers' Liability Act, although he might have seen the train in time to avoid the danger, and he had been generally warned to look out for trains running against the current of traffic, where approximately 13,000 trains had passed his section during the time he worked thereon, only one of which was so operated. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

Running Train Without Headlight.

Under the Federal Employers' Liability Act an employee does not assume the risk of injury from being struck by a train running at night without the headlight burning. Louisville & Nashville R. Co. v. Mullins, — Ky. —, 203 S. W. 1058.

Collision With Stationary Car.

A switchman riding a shunted car on a foggy night cannot be said, in an action under the Federal Employers' Liability Act, as a matter of law, to have assumed the risk of injury from colliding with a loaded car on a repair track, although he was in immediate charge of the movement of the cars, since his negligence in failing to ascertain the presence of the loaded car was not the sole proximate cause of the accident. Cincinnati, New Orleans & Texas Pac. R. Co. v. McGuffey, — C. C. A. —, 252 Fed. 25.

Collision With Train in Tunnel.

A lineman assumes the risk of injury, under the Federal Employers' Liability Act, of collision between a speeder he is riding and an unscheduled work train backing through an unlighted tunnel. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

Speeder Colliding With Wild Train.

A lineman does not assume, under the Federal Employers' Liability Act, the risk of injury from a speeder he is riding

colliding with an unscheduled work train backing through a tunnel without displaying a light, where he was not aware of a practice to so operate such trains. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

Violent and Unusual Movement of Cars.

Under the Federal Employers' Liability Act, a brakeman does not assume the risk of injury from the negligence of an engineer in suddenly stopping cars in an unusual and unnecessary manner in making a flying switch, although all risks ordinarily incident to the operation are assumed. Jones v. Norfolk Southern R. Co., — N. C. —, 79 S. E. 48.

Walking Over Moving Cars.

Where an engineer started a freight train while the fireman was in a lunch room eating, and the latter, an experienced and competent man, who knew or should have perceived the danger, boarded the moving train and on his way over the cars to the engine stumbled and fell between cars, under the Federal Employers' Liability Act he assumed the risk of injury. Briggs v. Union Pac. R. Co., — Kan. —, 175 Pac. 105.

(c) Look Out and Warning Signals.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 164.

In General.

A servant on the way from his work in crossing a railroad yard by the customary route does not, in an action under the Federal Employers' Liability Act, assume the risk of injury from the negligence of an engineer in backing a locomotive alone without first looking from the fireman's side to ascertain if the way is clear. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis.—, 167 N. W. 422.

By failing to leave a track on the approach of a train a section man does not assume the risk of injury from the failure of the engineer to give warning signals, but rather the former's conduct amounts to contributory negligence in an action under the Federal Employers' Liability Act. Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101.

Where a servant was injured by reason of the absence of a light from the rear end of the tender of a backing locomotive, under the Federal Employers' Liability Act he assumed the risk of injury, where he left the tender with his lantern thereby creating the conditions which caused his injury. Palermo v. Erie R. Co., — App. Div. —, 173 N. Y. Supp. 456.

(d) Passing Trains.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 164, and Vol. II, p. 111.

In General.

Under the Federal Employers' Liability Act a sectionman assumes only such risks of injury from passing trains as one ordinarily assumes by contracting to work upon a railway track when the usual precautions are observed for the safety of persons lawfully thereon. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

7. Insufficient Number of Employees.

See also same sections Federal Ry. Digest, Vol. I, No. 3, p. 141, and Vol. II, p. 111.

Lifting Heavy Weight With Insufficient Assistance.

Under the Federal Employers' Liability Act a servant assumes the risk of injury from lifting heavy timbers with insufficient assistance. Harmon v. Seaboard Air Line R. Co., — S. C. —, 96 S. E. 253.

Under the Federal Employers' Liability Act a servant assumes the risk of injury from lifting a heavy railway track with insufficient assistance, the danger being apparent to a reasonable man. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

A servant held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from attempting at the order or command of the defendant, to lift a heavy track with an insufficient force of men, where the plaintiff was not in any way misled by the order and knew the effect of obeying it. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517.

10. Improper Method of Doing Work.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 165, and No. 3, p. 142.

Chosing More Dangerous of Two Ways.

A servant cannot, in an action founded on the Federal Employers' Liability Act, be charged with assuming the risk of injury from chosing the more dangerous of two methods of performing a work, since it is contributory negligence. Illinois C. R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Pushing Coupler with Foot.

An experienced brakeman of mature years was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from attempting, while standing on the footboard of a slowly moving engine, to push a coupler

into line with his foot so as to make a coupling with a car standing on a curved track. Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

11. Objects Falling from Passing Trains.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 168.

In General.

A section hand does not, under the Federal Employers' Liability Act, assume the risk of injury from a cross-tie falling or being thrown from a rapidly moving train in consequence of the breaking of a standard on a car. Yazoo & Mississippi Valley R. Co. v. McCaskell, — Miss. —, 79 So. 817.

X. CONTRIBUTORY NEGLIGENCE.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 168-176, No. 3, pp. 142-143, No. 4, p. 49, and Vol. II, pp. 112-115.

For definition of contributory negligence, see supra II, D.

When contributory negligence question for jury, see infra. XIX, C, 3, (f).

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 168, and Vol. II, p. 112.

Distinction Between Contributory Negligence and Assumed Risk.

The failure of an employee to choose a safe rather than an unsafe way for performing a duty does not constitute an assumption of the risk of injury, but rather amounts to contributory negligence. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

The failure of a sectionman to leave the track on the approach of a train amounts to contributory negligence rather than an assumption of the risk, in an action under the Federal Employers' Liability Act, where the engineer failed to give appropriate warning signals on discovering the decendent's danger. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

In an action under the Federal Employers' Liability Act for the death of a section man who was struck by a west bound train running through a populous city at a high rate of speed on an east bound track without appropriate warnings being given or a proper lookout being kept, the conduct of the decedent in looking to the west while standing close to the track, he being struck just as he was turning, bears on the question of contributory negligence, and not on assumed risk, although he had been generally warned to look out for trains running against the current of traffic, where but one train out of about 13,000 had done so during the time he had been in the employ of the defendant. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

When Contributory Negligence an Issue.

Before the question of contributory negligence can arise in an action predicated on the Federal Employers' Liability Act, primary negligence on the part of the defendant must be shown. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

What Contributory Negligence Within Federal Act.

The Federal Employers' Liability Act does not limit contributory negligence to that which proximately contributes to an accident. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

The words "contributory negligence" as used in the Federal Employers' Liability Act, include such negligence as proximately contributes to an occasion which causes an injury. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

B. Effect of Federal Act on Common Law Rule.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 169-170, No. 3, p. 142, and Vol. II, p. 113.

2. As Complete Defense.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 169, No. 3, p. 142, and Vol. II, p. 113.

In General.

Contributory negligence is not a complete defense to an action founded on the Federal Employers' Liability Act, but can be considered only on the question of damages. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375; Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285, certiorari denied by Supreme Court; Eley v. Chicago Great Western R. Co., — Iowa, —, 166 N. W. 739; Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892; Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101; Cincinnati, New Orleans & Texas Pac. R. Co. v. Morgan, — Tenn. —, 201 S. W. 128; Baird v. Northern Pac. R. Co., — Wash. —, 170 Pac. 1016; Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

Contributory negligence is not a defense to an action founded on the Federal Em-

ployers' Liability Act. Davis v. Southern R. Co., — N. C. —, 96 S. E. 41.

Contributory negligence is not a bar to an action founded on the Federal Employers' Act. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

Contributory negligence will not bar a recovery under the Federal Employers' Liability Act, unless the sole cause of a servant's injury. Louisville & Nashville R. Co. v. Mullins, — Ky. —, 203 S. W. 1058.

Contributory negligence is not a defense to an action based on the Federal Employers' Liability Act, since the negligence of an injured servant is to be compared with that of his employer. Baird v. Northern Pac. R. Co., — Wash. —, 170 Pac. 1016.

Contributory negligence is not a full defense to an action founded on the Federal Employers' Liability Act. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

Contributory negligence is not a defense to an action under the Federal Employers' Liability Act. Reed v. Dickinson, — Iowa, —, 169 N. W. 673.

The contributory negligence of an employee in failing to ascertain from his time card, or the block signal lights, that a train was in the block, will not defeat a recovery under the Federal Employers' Liability Act for his death by being struck by a train running at night without the headlight burning. Louisville & Nashville R. Co. v. Mullins, — Ky. —, 203 S. W. 1058.

C. Reduction of Damages for Contributory Negligence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 170-172, No. 3, p. 142, and Vol. II, p. 113.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 170, No. 3, p. 142, and Vol. II, p. 113.

Effect of Contributory Negligence.

The effect of contributory negligence on the right to recover under the Federal Employers' Liability Act, is merely to diminish the amount of the plaintiff's damages. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333; Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375; Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285, certiorari denied by Supreme Court; Eley v. Chicago Great Western R. Co., — Iowa, —, 166 N. W. 739; Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101; Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

The effect of contributory negligence is merely to reduce the amount of recovery under the Federal Employers' Liability Act. Reed v. Dickinson, — Iowa —, 169 N. W. 673.

The only effect of contributory negligence is, under the Federal Employers' Liability Act, to reduce the amount of recovery. Louisville & Nashville R. Co. v. Mullins, — Ky. —, 203 S. W. 1058; Chicago, Rock Island & Pac. R. Co. v. Ward, —Okla.—, 173 Pac. 212.

The only effect of contributory negligence under the Federal Employers' Liability Act is to reduce the amount of the plaintiff's recovery. Brundage v. Southern Pac. Co., — Oreg. —, 174 Pac. 1139.

Contributory negligence merely reduces the amount of the recovery in an action under the Federal Employers' Liability Act. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

Waiver of Failure of Jury to Make Reduction.

A verdict for the plaintiff, in an action under the Federal Employers' Liability Act for the death of a brakeman in a rear end collision, will not be disturbed by an appellate court on the ground that the jury did not make an appropriate deduction for his contributory negligence in failing to perform his duty of signalling the following train, where the jury could rightfully infer that the condition of the weather and other circumstances made the performances of such duty so nearly impossible that no substantial allowance should be made on that account. Union Pac. R. Co. v. Hadley, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 318, affirming 99 Neb. 349, 156 N. W. 765.

When the plaintiff submits an action under the Federal Employers' Liability Act on the theory that contributory negligence is a complete bar to a recovery, and, by finding for him the jury finds him free from such negligence, an objection that the jury failed to make a reduction for contributory negligence is without merit. Hinton v. Chicago & Great Western R. Co., — Mo. App. —, 206 S. W. 396.

2. Method of Reduction.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 170, No. 3, p. 142, and Vol. II, p. 113.

In General.

The damages, in an action under the Federal Employers' Liability Act, should be diminished for the contributory negligence of the plaintiff in proportion to the amount of negligence attributable to him, so that he will recover only such propor-

tionate part of his full damages as bears the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence of both. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

The fact that the negligence of a servant contributes to his injury or death merely diminishes the amount of his recovery in an action under the Federal Employers' Liability Act, in proportion to the amount of negligence attributable to him. Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

The requirement of the Federal Employers' Liability Act that diminution of damages for contributory negligence shall be in proportion to the amount of negligence attributable to such employee, means that when the casual negligence is attributable partly to the carrier and partly to the employee, recovery cannot be for full damages, "but only for a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from recovery a proportional part of the damages corresponding to the employee's contribution to the total negligence." Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

When the negligence of the defendant in an action under the Federal Employers' Liability Act, is the proximate cause of the injury to an employee, who is also at fault, the damages are to be diminished in the proportion that the gravity of his own fault bears to the entire causal negligence attributable to both. O'Neill v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 1008.

The Federal Employers' Liability Act requires that the proportion of the contributory negligence of an injured employee shall be ascertained and the damages diminished to that extent. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

D. Effect of Violation of Safety Statutes.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 172, No. 3, p. 142, and Vol. II, p. 114.

(No new decisions.)

E. What Amounts to Contributory Negligence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 173-176, No. 3, p. 142, and Vol. II, p. 114.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 173, No. 4, p. 49, and Vol. II, p. 114.

Violation of Speed Ordinance.

A municipal speed ordinance is not admissible to prove the contributory negligence of an engineer in an action under the Federal Employers' Liability Act for an injury to his person while engaged in interstate commerce, since all state laws and municipal ordinances are superseded by the Federal law. McLain v. Chicago Great Western R. Co., — Minn. —, 167 N. W. 349.

Moving Cars in Front of Engine.

If by moving a car and caboose in front of the engine of his train a conductor contributed to his injury in a collision with a runaway car, in an action under the Federal Employers' Liability Act, his conduct amounts to contributory negligence, and not to an assumption of the risk. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

Crossing Tracks.

The timekeeper of a gang engaged in repairing a main interstate railway track held guilty of contributory negligence in an action under the Federal Employers' Liability Act, where he was killed while crossing the tracks on the way to a telegraph office to send his daily report to the roadmaster. Crecelius v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 205 S. W. 181.

Boarding Moving Cars.

An inexperienced brakeman held guilty of contributory negligence in attempting in the night time to board a moving car under the assumption that it had grab irons and sill steps on all four corners. Doehmer v. Pennsylvania R. Co., — C. C. A. —, 252 Fed. 553.

Using Defective Simple Tool.

A servant who is injured in consequence of using a simple tool which is obviously defective, is chargeable with contributory negligence rather than with assumption of the risk, in an action based on the Federal Employers' Liability Act. Williams v. Pryor, — Mo. —, 200 S. W. 53, certiorari denied 246 U. S. 660, 62 L. ed. 926, 38 Sup. Ct. Rep. 332.

5. Improper Method of Doing Work.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 176, No. 3, p. 143, and Vol. II, p. 115.

Choosing More Dangerous of Two Ways.

The failure of an employee to choose a safe instead of an unsafe way for doing

an act is contributory negligence and not an assumption of the risk which will bar a recovery under the Federal Employers' Liability Act. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

The adoption by a servant of the more dangerous way of placing iron under a trip hammer with his hands instead of using tongs or pick-ups, does not constitute an assumption of the risk in an action under the Federal Employers' Liability Act, but rather amounts to contributory negligence. Southern Pac. Co. v. De La Cruz, — Tex. Civ. App. —, 201 S. W. 428.

F. Necessity of Showing Freedom From Contributory Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 176.

(No new decisions.)

XI. FELLOW-SERVANT DOCTRINE.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 176, No. 3, p. 143, and Vol. II, p. 115.

Liability for negligence of, see supra VII, F, 12.

Assuming risk of negligence of fellow servants, see supra IX, D, 3.

When negligence of fellow servant jury question. See infra. XIX, C, 3, (q).

Effect of Federal Act on Common-Law Rule.

The fellow-servant doctrine is not a defense to an action founded on the Federal Employers' Liability Act. Lanis v. Illinois Central R. Co., 140 La. 1, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, judgment for plaintiff affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334; Royer v. Pennsylvania R. Co. — Pa. —, 103 Atl. 276.

XII. LAST CLEAR CHANCE DOCTRINE.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 177.

When Applicable.

The last clear chance doctrine does not apply to an action under the Federal Employers' Liability Act when the death of a servant is due to the concurrent negligence of himself and the defendant, and not to his previous negligence, and the defendant does not have the last opportunity of avoiding the injury. Hudson v. Seaboard Air Line R. Co., — N. C. —, 97 S. E. 388.

XIII. WHO ENTITLED TO BENEFIT OF ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 177-182, and No. 3, p. 143.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 177, and No. 3, p. 143.

(No new decisions.)

B. Employees of Carriers Other Than Defendant.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 177.

(No new decisions.)

C. In Case of Death of Employee.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 177, No. 3, p. 143, and Vol. II, p. 116.

1. In General.

When Action in Name of Beneficiaries Bar to Suit Under Federal Law.

The sustaining of an exception to the plaintiff's petition in an action by a widow in her own name under a state statute against an employer railway company for the death of her husband, on the ground that the suit was governed by the Federal Employers' Liability Act, is not res judicata of her individual demand so as to prevent a recovery by her in a representative capacity under the Federal law. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

5. Who Are Beneficiaries.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 179-181, No. 3, p. 143, and Vol. II, p. 115.

(d) Parents.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 180, No. 3, pp. 143-144, and Vol. II, p. 116.

Parents When Decedent Leaves Widow.

There cannot be a recovery under the Federal Employers' Liability Act for the benefit of a parent where a deceased servant left a widow surviving him, although living apart from him. New Orleans & Northeastern R. Co. v. Harris, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 535, reversing — Miss. —, 71 So. 913.

Settlement by Parent as Bar to Action by Administrator.

A settlement by a mother of her claim against a railway company for the death of her son, is no bar to a recovery for her benefit by a personal representative under the Federal Employers' Liability Act. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Dependency.

To support a recovery under the Federal Employers' Liability Act for the benefit of the surviving parents of a deceased employee, there must appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

The damages, in an action founded on the Federal Employers' Liability Act for the benefit of the surviving parents for the death of a son, are such as flow from the deprivation of the pecuniary benefits which the parents might have reasonably received if the decedent had survived. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Evidence that a son, who was killed within a few weeks after entering the employ of a railway company, during that time used a portion of his earnings to discharge the joint debts of his mother and himself, is sufficient to authorize the submission to the jury, in an action under the Federal Employers' Liability Act, of the question of the reasonable expectation of the mother of pecuniary benefit from the continuance of the decedent's life. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Even though an unmarried son made no contributions to the support of his father, declarations on the former's part of a purpose to do so are sufficient, in an action founded on the Federal Employers' Liability Act for his death, to authorize a finding of damages in the parent's favor. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

In an action under the Federal Employers' Liability Act for the benefit of surviving parents, it is not necessary in order to establish a reasonable expectation of pecuniary benefit from the continuance of the life of a son to prove that he had actually contributed to their support. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

The damages in an action under the Federal Employers' Liability Act for the benefit of the surviving parents of an employee, are limited strictly to the financial loss sustained by them from the death of such employee. Pittsburgh, C. C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

XIV. SURVIVAL OF EMPLOYEE'S RIGHT OF ACTION.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 182-184, and No. 3, p. 144.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 144.

(No new decisions.)

B. Prior to Amendment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 182.

(No new decisions.)

C. Subsequent to Amendment.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 182, No. 3, p. 144, and Vol. II, p. 116.

(No new decisions.)

XV. ADMINISTRATION OF DECEDENT'S ESTATE.

See generally Federal Ry. Digest, Vol. I, No. 2, p. 184, and No. 3, p. 144.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 184, and No. 3, p. 144.

(No new decisions.)

B. Sole Asset Cause of Action Under Federal Law.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 184, and No. 3, p. 144.

(No new decisions.)

C. Cause of Action Arising in Foreign State.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 184, and No. 3, p. 144.

(No new decisions.)

D. Collateral Attack.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 184.

(No new decisions.)

E. Compensation of Personal Representative.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 184.

(No new decisions.)

XVI. ACTIONS.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 184-227, No. 3, pp. 145-150, and No. 4, pp. 49-51, and Vol. II, pp. 117-131.

A. In General.

See generally same section Federal Ry. Digest, Vol. I, No. 3, p. 144.

Orders of Director General of Railroads respecting venue of actions, see Government Operation of Railways.

Law of case on second appeal, see infra XX, C, 5.

Setting up Federal law by amendment to answer, see infra XVI, J.

Law of Case.

The decision of an appellate court is the law of the case in an action based on the Federal Employer's Liability Act, on the second trial. Cincinnati, N. O. & T. P. R. Co. v. Goode, 169 Ky. 102, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 163 Ky. 60, 173 S. W. 329, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

Restraining Action in Foreign State.

A citizen of a state may be enjoined from prosecuting against a railway company, a citizen of the same state, an action under the Federal Employers' Liability Act in the courts of another state where it was brought for the purpose of subjecting the defendant to great and unnecessary expense, and to vexatiously harrass and annoy it without material benefit to the plaintiff. Reed v. Illinois Cent. R. Co., — Ky., —, 206 S. W. 794.

B. Transitory Nature.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 182.

(No new decisions.)

C. Limitations.

Application of state law, see infra XVI, D, 3, (i).

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 185, No. 3, p. 145, and Vol. II, 117.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185, No. 3, p. 145, and Vol. II, p. 117

When Reference to Federal Law Stricken Out.

Where a judgment for the plaintiff under the Federal Employers' Liability Act for wrongful death, is reversed by the Supreme Court of the United States because employment in interstate commerce is not shown, the plaintiff may amend his complaint by striking out all reference to such commerce and the Federal law, and set up a cause of action under the state law, to which the statute of limitations affords no defense, since a new cause of action is not shown by the amendment. Nash v. Minneapolis & St. Louis R. Co., — Minn. —, 169 N. W. 540, S. C. 242 U. S. 619, 61 L. ed. 531, 37 Sup. Ct. Rep. 239.

2. Accrual of Cause of Action.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185.

In General.

A cause of action under the Federal Employers' Liability Act accrues within two years from the date of an employee's death, and not from the time of the appointment of his administrator. Giersch v. Atchison, Topeka & Santa Fe R. Co., — Kan. —, 171 Pac. 591, S. C. 98 Kan. 452, 158 Pac. 54.

The two years period of limitation prescribed by the Federal Employers' Liability Act begins to run, with respect to an action for the pecuniary loss of the next of kin, from the day of the servant's death and not from that of his injury. Oliver v. Seaboard Air Line Ry., 250 Fed. 652.

An action based on the Federal Employers' Liability Act for personal injuries must be commenced within two years from the day the injuries were sustained. Atlantic Coast Line R. Co. v. Woods, — C. C. A. —, 252 Fed. 428, S. C. 151 C. C. A. 651, 238 Fed. 917.

On Appointment of Administrator.

An administrator cannot maintain an action under the Federal Employers' Liability Act when appointed more than two years after the death of an employee. Giersch v. Atchison, Topeka & Santa Fe

R. Co., — Kan. —, 171 Pac. 591, S. C. 98 Kan. 452, 158 Pac. 54.

3. Time as Condition.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185, and Vol. II, 118.

In General.

An action under the Federal Employers' Liability Act must be commenced within two years from the day the cause of action arose. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

The two years prescribed by section 6 of the Federal Employers' Liability Act for bringing actions thereunder, is not in strictness a statute of limitation affecting the remedy only, but is a statutory condition of liability affecting the claimant's right of action. Belch v. Seaboard Air Line R. Co., — N. C. —, 96 S. E. 640.

5. Excusing Failure to Bring in Time.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185, and Vol. II, p. 118.

Conduct of Defendant.

The failure of a servant to bring an action within two years for injuries received while employed in interstate commerce, is not excused by the fact that the carrier gave the plaintiff employment in consideration of his refraining from bringing an action, and that after the expiration of the two years he was discharged, since the limitation prescribed by the Federal Employers' Liability Act affects the right of action and not the remedy, and is a condition attached to the right given by the Federal law. Omin v. Baltimore & Ohio S. W. R. Co., 27 Ohio C. C. 143, affirming 20 Ohio N. P. (N. S.) 32, certiorari denied — Ohio —, — N. E. —.

The fact that the agent of a carrier, by representing to a servant that his injuries were not permanent, induced him not to bring action within two years, during which he was free from the influence of the defendant and had ample opportunity to ascertain the falsity of such representation, does not excuse the delay so as to permit an action under the Federal Employers' Liability Act. Whitman v. Seaboard Air Line R. Co. — S. C. —, 92 S. E. 861.

6. State Laws Saving Rights.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185, and Vol. II, p. 118.

In General.

A state statute of limitations providing that an action otherwise barred may be maintained if commenced within one year after a nonsuit has been entered, has no application to an action founded on the Federal Employers' Liability Act. Belch v. Seaboard Air Line R. Co., — N. C. —, 96 S. E. 640.

D. What Law Controls.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 185, No. 3, p. 49, and Vol. II, p. 118.

1. Federal Law.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 185, No. 3, p. 145, and Vol. II, p. 118.

In General.

In an action based on the Federal Employers' Liability Act rights and obligations depend upon such law and the applicable principles of the common law as interpreted and applied by the Federal courts. New Orleans & Northeastern R. Co. v. Harris, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 535, reversing — Miss. —, 71 So. 913.

When a servant of an interstate railway is killed while employed on a boat engaged in interstate commerce, the liability of the master is governed by the Federal Employers' Liability Act. The Erie Lighter 108, 250 Fed. 490.

The method of procedure provided by Congress must control an action in a state court for the enforcement of the remedy given by the Federal Employers' Liability Act. Swank v. Pennsylvania R. Co., — N. J. —, 104 Atl. 26.

2. State or Common Law.

See generally same section Federal Ry Digest, Vol. I, No. 2, pp. 187-191, No. 3, p. 146, and Vol. II, p. 119.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 187, No. 3, p. 146, and Vol. II, p. 119.

Effect of Subsequent State Legislation on Federal Act.

The Federal Employers' Liability Act is not affected by subsequent state legislation. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

Recovery Under State Law.

A railway employee cannot recover under a state law when injured while engaged in interstate commerce. Kleinuenther v. Philadelphia & Reading R. Co., 25 Pa. Dist. Rep. 425.

There cannot be a recovery under a state law when the evidence shows that a railway employee at the time of his death

was engaged in interstate commerce, although the Federal Employers' Liability Act is not pleaded. Day v. Chicago, Milwaukee & St. Paul R. Co., 208 Ill. App. 351.

State Law Enlarging Liability of Employer.

A state statute cannot enlarge the liabiltiy of the defendant in an action founded on the Federal Employers' Liability Act. Rash v. Atchison, Topeka & Santa Fe. R. Co., — Kan. —, 173 Pac. 1066.

Submission Under State Law When Federal Act Applicable.

It is prejudicial error to submit under the state law an action for injuries to a railway employee when the Federal Employers' Liability Act in fact controls, when under the state law contributory negligence is not a defense affecting the measure of damages. Nelson v. Ironwood & Bessemer Ry. & L. Co., — Mich. —, 170 N. W. 45.

Waiver of Improper Submission Under Federal Law.

By trying a case on the theory that it was governed by the Federal Employers' Liability Act the defendant waived the objection that in fact the state law controls. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 169 N. W. 429, S. C. 165 Wis. 610, 161 N. W. 751, 164 N. W. 88.

(g) Recovery Under State Workmen's Compensation Acts.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 190, No. 3, p. 146, No. 4, p. 49, and Vol. II, p. 120.

In General.

A recovery under the Federal Employers' Liability Act cannot be modified in any manner by the Workmen's Compensation Act of the state in which the accident happened. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

There can be no recovery under a state Workmen's Compensation Act for the death of a car inspector as the result of injuries sustained while inspecting an interstate train. Miller v. Grand Trunk Western R. Co., — Mich —, 166 N. W. 833.

A state Workmen's Compensation Act doe not apply to injuries received by railway employees without negligence on the part of their masters while both are engaged in interstate commerce, since the Federal Employers' Liability Act covers and occupies the whole field of liability wth respect to those employed in such commerce. Carey v. Grand Trunk Western R. Co., — Mich. —, 166 N. W. 492.

A state Workmen's Compensation Act does not apply where a railway smployee is killed while engaged in interstate commerce although without negligence on the part of the employer. McKenna v. New York Central R. Co., — Mich. —, 167 N. W. 900.

The remedy of a railway employee who is injured while engaged in interstate commerce is not under a state Workmen's Compensation Act, but under the Federal Employers' Liability Act exclusively. Connelly v. Michigan Cent. R. Co., 207 Ill. App. 25.

When No Liability Under Federal Law.

A railway company engaged in both interstate and intrastate commerce is not within the operation of a state Workmen's Compensation Act which provides that such carriers shall, in all cases when liability does not exist under the Federal laws, be liable in damages for injury or death of employees engaged in maintenance and operation of such railways or in the maintenance or construction of their equipment, to the same extent and subject to the same limitations as the liabiliy now existing or hereafter created by the laws of the United States governing recovery by railway employees engaged in interstate commerce.. Spokane & Inland Empire R. Co. v. Wilson, — Wash. —, 176 Pac. 34.

Election to Be Governed by.

The election of a railway company, engaged in both interstate and intrastate commerce, to come within a state Workmen's Compensation Act, does not constitute an election that it shall apply to injuries sustained by employees while engaged in interstate commerce, where the statute provides that it "shall apply to employees engaged in intrastate commerce, and those engaged in interstate commerce for whom a rule of liability or method of compensation has or may be established by Congress, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinct from interstate and foreign commerce," since the Federal Employers' Liability Act provides the exclusive remedy for injuries sustained by employees of carriers while both are engaged in interstate commerce. Carey v. Grand Trunk Western R. Co., — Mich. —, 166 N. W. 492.

When Judgment Sustained Under State Law.

When a judgment for the plaintiff cannot be sustained under the Federal Employers' Liability Act, because his employment in interstate commerce is not shown, it cannot be upheld under a state Employers' Liability Act on the ground

that, by disregarding all allegations relating to such commerce, a cause of action under the state law is disclosed, where the two acts are not identical, contributory negligence being a full defense under the state but not under the Federal law. Southern R. Co. v. Maxwell, — Miss. —, 77 So. 905.

Where a railway employee refused to accept compensation under a state Workmen's Compensation Act, and instituted an action under the Federal Employers' Liability Act, in which, because no liability under such law was shown, he submitted to a nonsuit more than six months after his injuries were sustained, he cannot thereafter prosecute a claim under the state law when it was not filed within six months as the law required. Schild v. Pere Marquette R. Co., — Mich. —, 166 N. W. 1018.

3. State Laws Relating to Particular Subjects.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 191-196, No. 3, p. 147, and Vol. II, pp. 122-124.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 191, No. 3, p. 147, and Vol. II, p. 122.

Inconsistent State Laws.

In an action under the Federal Employers' Liability Act for injuries received by a servant while engaged in interstate commerce, state constitutional and statutory provisions are inapplicable when in conflict with the Federal law. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

Costs on Appeal.

A state law relative to the cost of printing the record on appeal governs an action in a state court based on the Federal Employers' Liability Act. Going v. Norfolk & Western R. Co., 119 Va. 543, 89 S. E. 914, affirmed 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 22.

Parties to Action.

A state statute requiring actions for wrongful death to be brought in the name of an administrator ad prosequendum. does not extend to actions based on the Federal Employers' Liability Act, which may be brought in the name of the general administrator. Swank v. Pennsylvania R. Co., — N. J. —, 104 Atl. 26.

Lien of Attorney.

A state statute giving an attorney a lien for his fees on his client's cause of action is applicable to a suit in a state court based on the Federal Employers' Liability Act, when the attorney for the plaintiff has a contract for a portion of the amount of the recovery. Dickinson v. Stiles, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 415, affirming 137 Minn. 410, 163 N. W. 791.

(c) Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 193, No. 3, p. 147, and Vol. II, p. 123.

In General.

A state constitutional provision changing the common-law rule of assumption of risk is not applicable to an action founded on the Federal Employers' Liability Act. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

A provision of the constitution of a state making the question of assumption of risk one of fact for the jury in all cases, does not apply to an action based on the Federal Employers' Liability Act. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

(d) Contributory Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 193,, and Vol. II, p. 123.

In General.

A state constitutional provision altering the common-law rules of contributory negligence does not apply to an action based on the Federal Employers' Liability Act. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pa. 455, S. C. 39 Okla. 283, 135 Pac. 383.

(e) Damages.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 193, and Vol. II, p. 123.

Added Damages.

An award of 10% additional damages, as permitted under a state law, to the amount of a superseded judgment in an action under the Federal Employers' Liability Act, is not precluded by the fact that the defendant railway company is under Government control. Louisville & Nashville R. Co. v. Steel, — Ky. —, 202 S. W. 878.

(f) Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 193, No. 3, p. 147, and Vol. II, p. 123.

Burden of Proof.

The "scintilla" rule of evidence of the forum will be followed in an action in a

state court founded on the Federal Employers' Liability Act. Dutton v. Atlantic Coast Line R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion 245 U. S. 673, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

Presumption of Negligence.

A state statute creating a prima facie presumption of negligence in actions against railway companies has no application to a suit governed by the Federal Employers' Liability Act. Yazoo & Mississippi Valley R. Co. v. McCaskell, — Miss. —, 79 So. 817.

Since the question of the burden of proof of negligence in an action under the Federal Employers' Liability Act is a matter of substance which is not subject to control by state laws, a local statute making the proof of an injury by a locomotive prima facie evidence of the negligence of a railway company, has no application to an action based on such Federal law. New Orleans & Northeastern R. Co. v. Harris, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 535, reversing — Miss. —, 71 So. 913; New Orleans & Northeastern R. Co. v. Hanna, — Miss. —, 78 So. 953.

(i) Limitations.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 149.

In General.

Since the Federal Employers' Liability Act prescribes the time in which an action based thereon shall be commenced, no state statute of limitations can apply. Belch v. Seabord Air Line R. Co., — N. C. —, 96 S. E. 640.

(o) Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 196, 318-321, and Vol. II, p. 162.

Majority Verdict.

The requirement of the Seventh Amendment to the Federal Constitution that trials by jury shall be according to the course of the common law, does not prevent the application in a state court to an action under the Federal Employers' Liability Act, of a local law permitting majority verdicts. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212, Missouri, K. & T. R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

E. Jurisdiction of Courts.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 196-199, No. 3, p. 147, No. 4, p. 49, and Vol. II, p. 124.

Orders of Director General of Railroads respecting venue of actions, see Government Operation of Railways.

1. Federal Courts.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 196, and No. 4, p. 49.

In General.

The jurisdiction of a Federal court over an action under the Federal Employers' Liability Act depends on the fact whether an employee was engaged in interstate commerce at the time of his injury. Chicago & Alton R. Co. v, Allen, — C. C. A. —, 249 Fed. 280.

A Federal court does not acquire jurisdiction of an action resting on the Federal Employers' Liability Act by admissions or stipulations that a servant was engaged in interstate commerce at the time of his injury. Chicago & Alton R. Co. v. Allen, — C. C. A. —, 249 Fed. 280.

Venue of Actions Against Carriers Under Federal Control.

Under orders 18 and 18A made by the Director General of Railroads April 9th and 18th, 1918 (see Federal Ry. Digest Vol. III, No. 1, p. 80), it is necessary that an action under the Federal Employers' Liability Act against a carrier under Government control, be brought in the district or county wherein the cause of action accrued, or in which the injured servant resided at that time. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

When an action against a railway under Government control, is brought under the Federal Employees' Liability Act in a district or county other than that in which the cause of action accrued, or in which the injured person resided at that time, a plea in abatement will lie. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

2. State Courts.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 197, No. 3, p. 147, No. 4, p. 50, and Vol. II, p. 124.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 197, No. 3, p. 147, No. 4, p. 50, and Vol. II, p. 124.

When Death Occurs in a Foreign State.

A state court does not have jurisdiction of an action based on the Federal Employers' Liability Act for wrongful death occurring in another state, where the state death act expressly withholds jurisdiction from state courts when death occurs in a foreign state. Walton v. Pryor, 276 Ill. 563, 115 N. E. 2, writ of error dismissed 245 U. S. 675, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

A provision of a state constitution confering original jurisdiction on circuit

courts in all cases at law or in equity, does not confer jurisdiction over an action based on the Federal Employers' Liability Act for wrongful death which occurs within another state, where the state death act withholds jurisdiction from such state courts over actions for deaths occurring in foreign states. Walton v. Pryor, 276 Ill. 536, 115 N. E. 2, writ of error dismissed 245 U. S. 675, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

Section 6 of the Federal Employers' Liability Act as amended, conferring concurrent jurisdiction on the Federal courts and those of the several states, and prohibiting the removal to the Federal courts of actions from state courts of competent jurisdiction, confers jurisdiction on such state courts only as have power under the local laws to hear and determine such actions as are created by the Federal law. Walton v. Pryor, 276 Ill. 563, 115 N. E. 2, writ of error dismissed 245 U. S. 675, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

A circuit court of the state does not have jurisdiction of an action under the Federal Employers' Liability Act for wrongful death occurring outside of the state. Thomas v. Wells Fargo & Co., 208 Ill. App. 381.

Time When Jurisdiction May Be Questioned.

Since the consent of the parties cannot confer on courts jurisdiction of the subject matter, a state court's want of jurisdiction over an action under the Federal Employers' Liability Act may be questioned at any time. Walton v. Pryor, 276 Ill. 563, 115 N. E. 2, writ of error dismissed 245 U. S. 675, 62 L. ed. —, 38 Sup. Ct. Rep. 10.

F. Removal of Causes.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 199-205, No. 3, p. 147, No. 4, pp. 49-50, and Vol. II, pp. 124-125.

3. Since Amendment.

See generally same section Federal Ry. Digest, Vol. 1, No. 2, p. 199, No. 3, p. 147, No. 4, pp. 49-50, and Vol. II, pp. 124-125.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 199, No. 3, p. 147, No. 4, pp. 49-50, and Vol. II, pp. 124-125.

When Action Based on Federal Law.

The removal from a state court of competent jurisdiction to a Federal court of an action arising under the Federal Employers' Liability Act, is precluded by the express terms of section 6 thereof and section 28 of the Federal Judicial Code of March 3, 1911, ch. 231 (36 St. 1094). Givens v. Wight, 247 Fed. 233.

Section 28 of the Judicial Code of the United States precludes the removal from a state to a Federal court of an action based on the Federal Employers' Liability Act. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

On Failure to Show Employment in Interstate Commerce.

When the plaintiff's evidence in an action in a state court based on the Federal Employers' Liability Act, fails to show his employment in interstate commerce at the time he was injured, the defendant is not thereupon entitled to remove the case to a Federal court. Great Northern R. Co. v. Alexander, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 237, dismissing writ of error to 51 Mont. 565, 154 Pac. 914.

When the plaintiff in an action in a state court declares on the Federal Employers' Liability Act, and the defendant's contention that the evidence did not show that the former was employed in interstate commerce at the time of his injury, was sustained by the state court of last resort, the action was not thereupon converted into one which the defendant could remove to a Federal court on the ground of diverse citizenship. Great Northern R. Co. v. Alexander, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 237, dismissing writ of error to 51 Mont. 565, 154 Pac. 914.

When State Law Also Pleaded.

The defendant cannot obtain the removal of a railway employee's action from a state to a Federal court when the plaintiff's declaration sets up the Federal Employers' Liability Act in one count and the state law in another, since section 28 of the Judicial Code of 1911 limits the jurisdiction of the Federal courts as a class in actions founded on such Federal law. Mitchell v. Southern R. Co., 247 Fed. 819.

How and When Question of Removability Determined.

The rights of the parties with respect to the removal from a state to a Federal court of a railway employee's action for personal injuries, are to be determined as of the time when the first motion for removal is made. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

Whether an action is one under the Federal Employers' Liability Act or a state law is to be determined, for the purpose of removal from a state to a Federal court, from the pleadings as they stand when the petition and the bond for removal are filed. Northern Trust Co. v.

Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

An action in a state court arising under the Federal Employers' Liability Act and which is not removable to the Federal courts, cannot be converted into a removable one by the evidence of the defendant, or by an order of the court upon any issue tried on the merits. Great Northern R. Co. v. Alexander, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 237, dismissing writ of error to 51 Mont. 565, 154 Pac. 914.

Sufficiency of Pleadings.

In order that a railway employee's action for personal injuries shall not be removable from a state to a Federal court, his declaration must allege the essential facts which bring his cause of action under the Federal Employers' Liability Act, although he need not set out or refer to such act. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

A cause of action under the Federal Employers' Liability Act which is not removable from a state to a Federal court is shown by a complaint alleging that a railway company was engaged in both interstate and intrastate commerce, and that the plaintiff's intestate was killed while repairing a passenger coach used in such commerce, which was brought to a shop for repairs a short time before the accident with the view of being returned and continued in such use after the repairs were made. Cook v. Southern R. Co., — S. C. —, 96 S. E. 148.

When Federal Act Set up by Amendment.

The rights of the defendant to remove a railway employee's action from a state to a Federal court cannot be taken away after the denial of the motion, by amendments to the plaintiff's declaration showing a cause of action under the Federal Employers' Liability Act. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

The filing of additional counts to the plaintiff's declaration, alleging his employment in interstate commerce at the time he was injured, does not prevent the removal of the cause from a state to a Federal court on a motion made by the defendant at a time when the declaration did not show such employment. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

(b) Grounds.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 200-203, No. 3, p. 147, No. 4, pp. 49-50, and Vol. II, p. 125.

(3) Diverse Citizenship.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 200, and Vol. II, p. 125.

In General.

The removal from a state court of competent jurisdiction for diverse citizenship, of an action arising under the Federal Employers' Liability Act, is precluded by the express terms of section 6 thereof and section 28 of the Federal Judicial Code of March 3, 1911, ch. 231 (36 St. 1094). Givens v. Wight, 247 Fed. 233.

An action for the death of a railway employee is removable from a state court of competent jurisdiction to a Federal court for diverse citizenship, where the plaintiff's right to recover is based on the Federal Employers' Liability Act if the evidence shows that the decedent and the defendant were engaged in interstate commerce at the time of the former's death, and on a state law if they were not. Givens v. Wight, 247 Fed. 233.

Of Defendants.

When the complaint in a railway employee's action in a state court against a nonresident railway company and another nonresident defendant, sets out a joint tort and the railway company is liable under the Federal Employers' Liability Act, the individual defendant cannot remove the suit to a Federal court. Powell v. Southern R. Co., — S. C. —, 96 S. E. 292.

4. Petition for Removal.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 203, and Vol. II, p. 125.

What Must be Shown.

The defendant's petition for the removal from a state to a Federal court of an employee's action for personal injuries, need not show that the cause of action is one which does not arise under the Federal Employers' Liability Act, where the plaintiff's declaration fails to allege his employment in interstate commerce at the time of his injury, although the defendant's employment therein is stated. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

What Papers Considered on Motion.

The court must look to the plaintiff's petition only in determining whether an action for injuries to a railway employee is within the Federal Employers' Liability Act, and not removable to a Federal court from a state court of competent jurisdiction. Givens v. Wight, 247 Fed. 233.

6. Remand to State Court.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 203, and Vol. II, p. 126.

Conclusiveness of Determination of State Court.

The determination of a state court that an action is not governed by the Federal Employers' Act, and that it is removable to a Federal court, is not conclusive on the latter court so as to preclude it from remanding the suit to the state court if it appears that the Federal Act does control. Deuel v. Chicago, Burlington & Quincy R. Co., 253 Fed. 857.

7. Waiver of Wrongful Removal.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 204.

In General.

No conduct of the plaintiff in a Federal court will preclude him from obtaining the remand to a state court of an action based on the Federal Employers' Liability Act which was wrongfully removed by the defendant, since section 28 of the Judicial Code of 1911 places a limitation upon the jurisdiction of Federal courts as a class in actions under such law. Mitchell v. Southern R. Co., 247 Fed. 819.

Pleading to Merits.

When the plaintiff's declaration in an action for injuries to a railway employee, does not show a cause of action under the Federal Employers' Liability Act at the time the first motion for removal is made, by pleading to the declaration after the denial of the motion to remove and contesting the cause on the merits, the defendant does not waive the right to assign error on the denial of the motion. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

G. Election of Remedies.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 205, and No. 3, p. 147.

(No new decisions.)

H. Parties.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 207-210, No. 3, pp. 147-148, and Vol. II, p. 126.

3. Defendants.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 209.

(c) Carrier and Negligent Coemployees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 209, and Vol. II, p. 126.

In General.

In an action against a railway company and a negligent coemployee it was error for the trial court to disallow a portion of the defendant's answer setting up a misjoinder of causes of action, where, in the same count, the plaintiff set up the Federal Employers' Liability Act against the railway company and a state law as to the individual defendant, the appellate court having previously held such joinder to be improper. Lee v. Central of Georgia R. Co., — Ga. App. —, 94 S. E. 888, S. C. — Ga. —, 94 S. E. 558, — Ga. App. —, 95 S. E. 718.

It was error for the trial court to disallow a portion of the defendant's answer which set up a misjoinder of parties in an action under the Federal Employers' Liability Act against a railway company and a negligent coemployee, after the appellate court had held that there was a misjoinder. Lee v. Central of Ga. R. Co., — Ga. App. —, 94 S. E. 888, S. C. — Ga. —, 94 S. E. 558, — Ga. —, 94 S. E. 558, — Ga. App. —, 95 S. E. 718.

(d) Lessor and Lessee.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 210.

In General.

An employee of a lessor railway company may base an action under the Federal Employers' Liability Act against both a lessor and a lessee company for injuries sustained by the negligence of the latter, where the state statute makes both lessor and lessee liable for the negligence of the other. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

I. Revivor.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 210.

(No new decisions.)

J. Pleading.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 210-227, No. 3, pp. 148-150, No. 4, pp. 49-50, and Vol. II, pp. 127-131.

1. Declaration or Complaint.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 210-220, No. 3, pp. 148-149, No. 4, pp. 49-50, and Vol. II, pp. 127-129.

(b) What Must Be Alleged.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 210-214, No. 3, p. 148, No. 4, pp. 49-50, and Vol. II, pp. 127-128.

(1) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 210, and Vol. II, p. 127.

Pain and Suffering in Death Action.

In order to recover under the Federal Employers' Liability Act for the pain and suffering of a deceased servant and the pecuniary loss sustained by his next of kin, both causes of action must be declared upon. Lennon v. Erie R. Co., — N. J. —, 104 Atl. 444.

(2) Federal Law.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 210, and No. 4, pp. 49-50.
See also supra XIX, D 1.

In General.

When the pleadings in an action for injuries to a railway employee are sufficient to admit evidence of his employment in interstate commerce at the time of his injury, the Federal question is sufficiently raised without directly setting up the Federal Employers' Liability Act. Chicago, R. I. & G. R. Co. v. DeBord, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667, certiorari denied 245 U. S. 652, 62 L. ed. —, 38 Sup. Ct. Rep. 12.

It is not necessary to set out or refer to the Federal Employers' Liability Act in the plaintiff's declaration in order to state a cause of action thereunder, it being necessary to state only the essential facts needed to bring the case within the federal law. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

(3) Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 212, No. 3, p. 148, and Vol. II, p. 128.

In General.

That both a carrier and an employee were engaged in interstate commerce at the time the latter was injured must be alleged and proved by the plaintiff in order to recover under the Federal Employers' Liability Act. Borrow v. Chicago, Burlington & Quincy R. Co., 206 Ill. App. 287.

A cause of action under the Federal Employers' Liability Act is not shown unless the plaintiff's declaration alleges his employment in interstate commerce at the time of his injury, it is not sufficient to merely aver that the defendant was engaged in such commerce. Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 N. E. 986.

(7) Negativing Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 214.

In General.

The plaintiff's declaration in an action under the Federal Employers' Liability Act, must show that he did not assume the risk of injury from the alleged negligence of the defendant. William v. Illinois Cent. R. Co., 207 Ill. App. 517.

(c) Sufficiency.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 214-218, No. 3, pp. 148, No. 4, pp. 49-50, and Vol. II, p. 128.

(1) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 214, No. 3, p. 148, and No. 4, p. 50.

Relation of Master and Servant.

The relation of master and servant is sufficiently shown by a declaration in an action under the Federal Employers' Liability Act, alleging in substance that a boy fifteen years old was killed while riding on a train under a contract of employment made with the trainmen, who were customarily permitted to hire special employees. Roberts v. Southern R. Co., — Tenn. —, 206 S. W. 457.

Duty to Warn of Danger.

The declaration in an action under the Federal Employers' Liability Act, held sufficient to raise the question whether it was the duty of the defendant to warn an inexperienced section hand of the danger of a rail flying from wreckage when a wrecking crew applied power to a pair of trucks to remove them from the debris. McDougall v. Chicago & Northwestern R. Co., — Wis. —, 170 N. W. 266.

(3) To Show Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 216, No. 3, p. 148, and Vol. II, p. 128.

In General.

A petition in an action against a railroad company for personal injuries to an employee, stating that the defendant owned and operated a system of steam commercial railroads traversing several named states, when not attacked by demurrer, sufficiently shows the interstate character of the defendant so as to bring the action within the Federal Employers' Liability Act. Martinson v. Chicago, Burlington & Quincy R. Co., — Neb. —, 166 N. W. 624.

A petition states a cause of action under the Federal Employers' Liability Act by alleging in substance that the defendant owned and operated a railway throughout Nebraska and other designated states, and that the plaintiff, while engaged as a baggage handler at a transcontinental station, was injured by a trunk which a coservant let fall, where it was not alleged that the action was brought under the state law. Eskelsen v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

3. Plea or Answer.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 220-222, and Vol. II, pp. 129-131.

(b) What Defenses Must Be Pleaded.

(1) In General.

Federal Law.

The defendant must plead the Federal Employers' Liability Act in order to invoke its protection in an action based on a state law for the death of a railway employee. Central of Ga. R. Co. v. De Loach, 18 Ga. App. 362, 89 S. E. 433, reversed without opinion 246 U. S. 655, 62 L. ed. —, 38 Sup. Ct. Rep. 432.

(2) Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 220, and Vol. II, p. 129.

In General.

A plea in an action based on the Federal Employers' Liability Act, showing a want of ordinary care on the part of an employee in the discharge of his duties and charging aggravated negligence tending to cause his injury, shows contributory negligence rather than an assumption of the risk. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375.

(3) Contributory Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 221, and Vol. II, p. 130.

In General.

A demurrer should be sustained to a plea of contributory negligence as a bar to an action under the Federal Employers' Liability Act. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375.

Contributory negligence need not be pleaded in an action under the Federal Employers' Liability Act, since put in issue by a plea of not guilty. Louisville & Nashville R. Co. v. Wright, — Ala. —, 80 So. 93.

4. Amendments.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 222-226, No. 3, p. 140, and Vol. II, p. 130.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 3, p. 149, and Vol. II, p. 130.

Showing Date of Accident.

In an action based on the Federal Employers' Liability Act, the plaintiff may be permitted to amend his petition at the trial more than two years after he was injured, so as to show the true date of the accident, where the action was commenced within two years from that date. Martinson v. Chicago, Burlington & Quincy R. Co., — Neb. —, 166 N. W. 624.

Striking Out Reference to Federal Law.

When the evidence shows that a servant was killed while engaged in intrastate commerce, there is no error in permitting an amendment of the complaint, in an action for his death, by striking out allegations of employment in interstate commerce. Lusk v. Phelps, — Okla. —, 175 Pac. 756.

Where a judgment for the plaintiff under the Federal Employers' Liability Act for wrongful death, is reversed by the United States Supreme Court because the decedent was not employed in interstate commerce at the time of his death, the plaintiff may subsequently amend his complaint by striking out all reference to such act and employment in such commerce, and set up a cause of action under the state law, since a new cause of action is not thereby introduced. Nash v. Minneapolis & St. Louis R. Co., — Minn. —, 169 N. W. 540, S. C. 242 U. S. 619, 61 L. ed. 531, 37 Sup. Ct. Rep. 239.

It was not an abuse of discretion to refuse the defendant further time in which to answer in an action for personal injuries, on permitting the plaintiff, after the testimony was all in, to strike from his complaint all reference to his employment in interstate commerce, which the evidence failed to show, and which the defendant's original answer denied. O'Dell v. Southern R. Co., 248 Fed 343, affirmed — C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

(b) Setting Up Federal Law.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 222-224, No. 3, p. 149, and Vol. II, p. 130.

(1) In General.

Abuse of Discretion.

The refusal to permit the plaintiff, in an action for the death of a railway em-

ployee, to amend his declaration by pleading the Federal Employers' Liability Act, held not an abuse of discretion, Mumpower v. Black Mt. R. Co., 147 N. C. 742, 94 S. E. 515, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

On Remand from Appellate Court.

Where the case shown on appeal is under a state law the court will not determine the rights of the parties under the Federal Employers' Liability Act, but on a new trial the lower court may permit such amendments as may be desired and may determine the action under the Federal law. Cincinnati, N. O. & T. P. R. Co. v. Goode, 155 Ky. 153, 159 S. W. 695, S. C. 133 Ky. 247, 154 S. W. 941, 163 Ky. 60, 173 S. W. 329, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

(2) After Two Years.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 223, No. 3, p. 149, and Vol. II, p. 130.

In General.

Where a cause of action arises under the Federal Employers' Liability Act, and suit is brought under a state law, or by some person not authorized to maintain it under the Federal Law, defects in the original petition may be cured by amendment, although made more than two years after the cause of action accrued, where a new and distinct cause is not set up, since the amendment relates back to the filing of the original petition. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 254 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

An action may be brought within the Federal Employers' Liability Act by amendment of the petition more than two years after the cause of action accrued. Baltimore & O. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 335.

Where an employee's action for personal injuries was begun within two years after the accident, and the pleadings, although sufficient to show a cause of action under the Federal Employers' Liability Act, were treated as falling within a state law, a new or different cause of action which was barred by the period of limitation prescribed by the Federal act, was not presented by an amendment made more than two years after the injury, which reiterated the averments of the original petition, and set them out more fully so as to show that the action arose under the Federal law. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed, 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

When the petition in a servant's action for personal injuries, alleges that the defendant owns and operates a railway throughout Nebraska, and other named states, and that the plaintiff, while engaged as a baggage handler at a transcontinental station, was injured by a trunk which a coemployee let fall, without stating that the action was under the state law, a new cause of action was not disclosed by an amendment to the petition filed more than two years after the injury was received, alleging in more specific terms the interstate character of the employment of the plaintiff and the defendant. Eskelson v. Union Pac. R. Co., — Neb. —, 167 N. W. 408.

When the plaintiff's declaration in an action for injuries to a railway employee, is based on the state law and his employment in interstate commerce is expressly denied, he cannot amend his pleadings more than two years after his injury was sustained and set up the Federal Employers' Liability Act, since a new cause of action is disclosed. Borrow v. Chicago, Burlington & Quincy R. Co., 206 Ill. App. 287.

When the complaint in an action for injuries to a railway employee shows a cause of action at common law or under a state statute, such pleading may be amended more than two years after the cause of action accrued by setting up the Federal Employers' Liability Act. Curtice v. Chicago & Northwestern R. Co., — Wis. —, 166 N. W. 444, affirming on second appeal 162 Wis. 421, 156 N. W. 484, L. R. A. 1916 D. 316, certiorari denied 247 U. S. 510, 62 L. ed. —, 38 Sup. Ct. Rep. 578.

(c) Alleging Representative Capacity.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 223, No. 3, p. 149, and Vol. II, p. 30.

In General.

Where, within two years after the death of her husband, a widow brings action against an employer railway company in her own name under a state law, she may be permitted to amend her petition more than two years after her husband's death, by setting up her representative capacity so as to permit a recovery under the Federal Employers' Liability Act, since a new cause of action was not introduced by the amendment. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

After a judgment in favor of a widow individually for the death of her husband, was reversed because governed by the Federal Employers' Liability Act and maintainable only by a personal representative, she may, more than two years after the cause of action accrued, be joined rather than substituted as plaintiff in a representative capacity. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

Where, after a judgment for the plaintiff in an action by a widow in her own name for the death of her husband, was reversed because the Federal Employers' Liability Act controlled, and the suit must be prosecuted by the personal representative, and more than two years after her husband's death she was permitted to amend her petition by setting up her representative capacity, her cause of action under the Federal act was barred. Giersch v. Atchison, Topeka & Santa Fe R. Co., — Kan. —, 171 Pac. 591, S. C. 98 Kan. 452, 158 Pac. 54.

(e) Conforming to Proofs.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 226, No. 3, p. 150, and Vol. II, p. 131.

In General.

Where, after all the evidence was introduced in an action for personal injuries, the plaintiff was permitted to strike from his complaint all reference to his employment in interstate commerce at the time of his injury, which the defendant's answer denied and which the testimony failed to show, and on a second trial the defendant set up employment in such commerce and that the Federal Employers' Liability Act controlled, the action should not be dismissed, but the plaintiff should be permitted to amend his complaint to conform to the proofs. O'Dell v. Southern R. Co., 248 Fed. 345, affirmed — C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

(g) Plea or Answer.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 226.

In General.

It is not an abuse of discretion to refuse the defendant permission on the third trial of a railway employee's action for personal injuries, after the introduction of part of the defendant's evidence, to amend its answer by setting up the Federal Employers' Liability Act. Breen v. Iowa Cent. R. Co., — Iowa, —, 168 N. W. 901, S. C. 159 Iowa, 537, 141 N. W. 410.

The defendant cannot, on the third trial of a railway employee's action for personal injuries, after former has introduced part of its evidence, amend its answer by setting up the Federal Employers' Liability Act, and the failure of the plaintiff to bring his action within the time thereby prescribed. Breen v. Iowa Cent. R. Co., — Iowa, —, 168 N. W. 901, S. C. 159 Iowa, 537, 141 N. W. 410.

In an action in the name of a widow against a railway company for the death of her husband, when the pleadings do not show the employment of either the decedent or the defendant in interstate commerce, the defendant should be permitted, at the close of the plaintiff's case, to amend its answer so as to invoke the Federal Employers' Liability Act by setting up the decedent's employment in such commerce at the time he was killed, even though the verifying affidavit does not show that such fact might have been previously discovered by ordinary diligence. Central of Ga. R. Co. v. De Loach, 18 Ga. App. 362, 89 S. E. 433, reversed without opinion 246 U. S. 655, 62 L. ed. —, 38 Sup. Ct. Rep. 423.

In an action under the state law for the death of employee, when the pleadings do not show the employment of the decedent or the defendant in interstate commerce, the refusal to permit the defendant, at the close of the plaintiff's case, to amend its answer by invoking the Federal Employers' Liability Act, is not prejudicial error where the evidence to support the amendment is insufficient to show employment in such commerce. Central of Ga. R. Co. v. DeLoach, 18 Ga. App. 362, 89 S. E. 433, reversed without opinion 246 U. S. 655, 62 L. ed. —, 38 Sup. Ct. Rep. 423.

6. Pleading Over.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 227.

Time to Plead.

It was not an abuse of discretion to refuse the defendant further time in which to answer in an action for personal injuries, on permitting the plaintiff, after the testimony was all in, to strike from his complaint all reference to his employment in interstate commerce, which the evidence failed to show, and which the defendant's original answer denied. O'Dell v. Southern R. Co., 248 Fed. 343, affirmed — C. C. A. —, 252 Fed. 540, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 6.

8. Plea or Answer as Express Aider of Defective Complaint.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 227.

In General.

When the complaint in a railway employee's action for personal injuries which

is clearly within the terms of the Federal Employers' Liability Act, fails to allege employment in interstate commerce the omission is cured by the averments of the defendant's answer setting up such employment. King v. Norfolk & Southern R. Co., — N. C. —, 97 S. E. 29.

XVII. DAMAGES.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 227-239, No. 3, p. 150, No. 4, p. 51, and Vol. II, pp. 131-136.

A. In General.

Limiting Liability in Admiralty.

When an action is brought in a state court under the Federal Employers' Liability Act for the death of a servant employed on a lighter used in interstate commerce by a railway engaged therein, solely by reason of defects in the boat, the defendant may proceed in a Federal court for a limitation of its liability to the value of the boat as permitted by the Federal laws. The Erie Lighter 108, 250 Fed. 490.

When a servant employed on an empty lighter engaged in interstate commerce and owned by a railway also engaged therein, was killed in consequence of defects in the boat, in an action under the Federal Employers' Liability Act, the liability of the defendant will be limited in admiralty to the value of the lighter only and will not be extended to the towing tug, although owned by the defendant, when the tug was free from proximate negligence. The Erie Lighter 108, 250 Fed. 490.

When the defendant, in an action in a state court under the Federal Employers' Liability Act for the death of a servant on a lighter used in interstate commerce petitions a Federal court for a limitation of liability to the value of the boat because the accident was due solely to defects therein, to which relief the court finds the defendant entitled, it may also determine the ultimate liability of the defendant and assess damages, and also restrain the state court from proceeding further. The Erie Lighter 108, 250 Fed. 490.

Depreciated Earning Value of Money.

The fact that the money value of life and health is appreciating, and the earning capacity of money is steadily depreciating may be considered in determining whether a verdict under the Federal Employers' Liability Act is excessive, and the result of passion and prejudice. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

B. For Injuries.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 227-228, No. 3, p. 150, No. 4, p. 51, and Vol. II, p. 131.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 227, No. 3, p. 150, No. 4, p. 151, and Vol. II, p. 131.

General Rules.

The rule of damages for the wrongful death of a railway employee is the same under the Federal Employers' Liability Act as that of the Texas courts. Galveston, Harrisburg & San Antonio R. Co. v. Hill, — Tex. Civ. App. —, 202 S. W. 358.

There is no merit in the contention that, because the Federal Employers' Liability Act is virtually a compensation statute fixing liability for defective appliances regardless of the question of negligence, public policy demands that there shall not be a verdict as large as $20,000 for personal injuries. Galveston, Harrisburg & San Antonio R. Co. v. Hopkins, — Tex. Civ. App. —, 202 S. W. 222.

The same test in fixing the amount of damages is applied in actions under the Federal Employers' Liability Act for personal injuries, as in any case of negligence in which the law does not designate certain acts of omission or commission as negligence per se, since compensation is the end to be obtained in each instance. Galveston, Harrisburg & San Antonio R. Co. v. Hopkins, — Tex. Civ. App. —, 202 S. W. 222.

Recovery for Loss of Minor's Earnings.

Where, under the state law, a parent is not absolutely entitled to the earnings of a minor child there may be a recovery for the lost earnings of a minor son in an action under the Federal Employers' Liability Act for personal injuries. Kuchenmeister v. Los Angeles & Salt Lake R. Co., — Utah —, 172 Pac. 725.

Punitive Damages.

In the absence of evidence of wilfulness and wantoness on the part of the defendant punitive damages cannot be awarded in an action under the Federal Employers' Liability Act. Whitman v. Seaboard Air line R. Co., — S. C. —, 92 S. E. 861.

Penalizing Defendant on New Trial.

Where a new trial was granted in an action under the Federal Employers' Liability Act for wrongful death, mainly to permit the defendant to show the contributory negligence of the decedent, which it failed signally to establish on the second trial, an award of the jury of $9,000 in excess of the former verdict cannot be up-

held when probably allowed as a penalty for the failure of the defendant to establish such fact. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

C. For Death.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 229-233, No. 3, pp. 150-151, and Vol. II, p. 132.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 229, No. 3, p. 50, No. 4, p. 61, and Vol. II, p. 132.

Measure of Damages.

Under the Federal Employers' Liability Act the damages for wrongful death are based on the pecuniary loss sustained by the beneficiaries of the deceased servant. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

In an action under the Federal Employers' Liability Act, for wrongful death the jury must find what pecuniary benefit each beneficiary had reason to expect from the continued life of the decedent, and the recovery must be limited to the compensation of those relatives in the proper class who are shown to have sustained pecuniary loss. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

The formula adopted for computing the present value of future benefits lost by the beneficiaries of a deceased employee, in awarding compensation under the Federal Employers' Liability Act, is as follows, viz.: Subtract from the annual wages the employee was earning the annual cost of his maintenance, according to the evidence, and multiply the remainder by the number of years of his life expectancy; the result discounted at the legal rate of 5 per cent. for the term of the life expectancy, using the annual periods of rest, is the loss of future benefits reduced to present value. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

Life Expectancy.

In determining the life expectancy of a locomotive engineer in an action based on the Federal Employers' Liability Act, according to the expectancy table constructed from the American Experience Table of Mortality, the courts adopt the rule of the insurance companies of adding eight years to the age of the man because of his hazardous occupation. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

Rule in State Courts.

The rule of damages in an action in a state court under the Federal Employers' Liability Act for wrongful death, is that of the Federal courts, which permits a recovery of compensatory damages only based on the pecuniary loss sustained by the surviving beneficiaries. Castle v. Union Pac. R. Co., — Minn. —, 166 N. W. 767.

The state courts are obliged, by the rulings of the Supreme Court of the United States, to fix the amount of compensation, if due to the beneficiaries of a deceased employee, under the Federal Employers' Liability Act, at the present cash value of what the decedent might reasonably have contributed to the support of the beneficiaries during the term of his life expectancy, according to the evidence; the right of recovery being limited to the pecuniary loss, which is to be determined or computed by discounting the lost future benefits, at a fair or reasonable rate at which the money might be loaned or invested safely at interest, for each year of the life expectancy. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

4. Loss Sustained by Widow and Children.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 231, No. 3, p. 150, and Vol. II, p. 132.

In General.

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act for wrongful death, that money would be worth the legal rate of six per centum to a widow, or that the period during which her financial benefits from her husband should have continued was limited to his life expectancy, and that he would not in any event have outlived his probable expectancy. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 375, affirming 168 Ky. 262, 181 S. W. 1126.

Measure of Damages for Death of Husband and Father.

The measure of damages under the Federal Employers' Liability Act for the death of a husband and father, is a sum equivalent to compensation of the widow and children for the deprivation of a reasonable expectation of pecuniary benefits, at present cash value, which would have resulted from the continued life of the decedent. The Erie Lighter 108, 250 Fed. 490.

The damages awarded under the Federal Employers' Liability Act for the benefit of minor children may include the loss

of the care, counsel, training and education, if any, which they might have reasonably received from the decedent had he lived, and which can be supplied only by services of another for compensation. The Erie Lighter 108, 250 Fed. 490.

When Proof of Pecuniary Loss Necessary.

Actual proof of pecuniary loss is not essential in an action under the Federal Employers' Liability Act for the benefit of a widow and minor child, who are not shown to be living wrongfully apart from the husband and father so as to have forfeited their right to support. The Erie Lighter 108, 250 Fed. 490.

Value of Decedent's Savings.

A holding that a widow was entitled, in an action under the Federal Employers' Liability Act, to what she would have spent for maintenance and support and what she would otherwise have received from her husband, does not permit an allowance to her for a portion of what the decedent might have accumulated. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

Services to Invalid Wife.

Care and valuable services rendered an infirm wife by her husband may be shown in an action under the Federal Employers' Liability Act for his death, when such services can be thereafter obtained only for money. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

Present Worth of Award.

The damages awarded in an action under the Federal Employers' Liability Act for the benefit of a widow must be at their present worth. Louisville & Nashville R. Co. v. Holloway, 246 U. S., 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

5. Loss to Parents.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 233, and Vol. II, p. 133. See also generally supra XIII, C. 5.

Measure of Damages.

The damages for the benefit of surviving parents are limited, under the Federal Employers' Liability Act, to the financial loss sustained by them from the death of a railway employee. Pittsburgh, C., C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

D. Mitigation.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 233.

(No new decisions.)

E. Apportionment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 233, and Vol. II, p. 133.

In General.

The Federal Employers' Liability Act does not require the jury to make any apportionment among the beneficiaries of the damages awarded a widow and children for the death of an employee. Gulf, Colorado & Santa Fe R. Co. v. Carpenter, — Tex. Civ. App. —, 201 S. W. 270.

The apportionment by the jury, under instructions from the court, among the several beneficiaries, of the damages awarded a widow and children under the Federal Employers' Liability Act, is not erroneous, since the defendant is not thereby injured as the judgment is a bar to any subsequent action by such beneficiaries. Gulf, Colorado & Santa Fe R. Co. v. Carpenter, — Tex. Civ. App. —, 201 S. W. 270.

The jury may apportion among the beneficiaries the damages awarded under the Federal Employers' Liability Act for wrongful death. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

F. Reasonableness.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 233-238, No. 3, p. 150, No. 4, p. 51, and Vol. II, pp. 133-135.

1. For Personal Injuries.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 233-236, No. 3, p. 150, No. 4, p. 51, and Vol. II, p. 133.

(b) Injury to or Loss of Members.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 234, No. 3, p. 150, and Vol. II, p. 134.

Fingers.

A verdict for $7,000 is not excessive in an action based on the Federal Employers' Liability Act for the loss of three fingers of the left hand and a stiffened thumb. Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by Supreme Court.

Arm.

A judgment for $85,000 in an action under the Federal Employers' Liability Act for the loss of both arms at the shoulder and for resulting suffering from electric burns, held excessive, and a new trial ordered unless the plaintiff remit $30,000. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

Arm and Leg.

A verdict in favor of a servant aged thirty-one years, for $30,000, for the loss of his right arm above the elbow and of his left leg below the knee, and for mental and physical pain and suffering endured, when not shown to have been influenced by bias, prejudice, partiality, corruption or mistake on the part of the jury, or misdirection of the court, will not be set aside as excessive in an action under the Federal Employers' Liability Act. Dumphy v. Norfolk & Western R. Co., — W. Va. —, 95 S. E. 863.

Leg.

Twenty thousand dollars is not an excessive award under the Federal Employers' Liability Act where an employee lost his right leg just below the knee, four operations being necessary, the lower end of his spine was injured so that he was caused great pain in his back and head, and to suffer from dizziness, his heart and kidneys affected, his knee injured so as to destroy the lubricating oil, his health permanently impaired, and he has and always will suffer from his injuries. Galveston, Harrisburg & San Antonio R. Co. v. Hopkins, — Tex. Civ. App. —, 202 S. W. 222.

Feet.

An award of $12,500 for an injury to the foot of a brakeman 24 years of age, who earned $1,080 per annum, will not be held excessive in an action under the Federal Employers' Liability Act, where he suffered pain daily and his foot required dressing for six years before the trial and his injuries left him permanently crippled and unable to follow railroading. Cincinnati, N. O. & T. P. R. Co. v. Goode, 169 Ky. 102, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 163 Ky. 60, 173 S. W. 329, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

An award of $2,500 damages is not excessive under the Federal Employers' Liability Act, for an injury to the arch of the foot of a laborer 36 years old, who is qualified only to do common manual labor, and whose injury will for life disable him from doing work requiring walking or standing on the feet for any length of time. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54.

Back.

A verdict for $7,500 held not excessive in an action based on the Federal Employers' Liability Act for an injury to the back of a fireman 35 years old, which caused him much pain and compelled him to walk with a cane, the effect of his injuries being such as to be probably felt all of his life, and to render him unable to labor again. Hinton v. Chicago & Great Western R. Co., — Mo. App. —, 206 S. W. 396.

2. For Death.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 236-238, No. 3, p. 150, and Vol. II, pp. 134, 135.

(a) In General.

See also same section Federal Ry. Digest, Vol. II, p. 134.

For Death.

A verdict for $18,000 under the Federal Employers' Liability Act for the death of a switchman 28 years of age, who earned $125 monthly, is not excessive. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

A verdict for $3,500 held not excessive for wrongful death in an action under the Federal Employers' Liability Act. Santomassimo v. New York, Susquehanna & Western R. Co., — N. J. —, 105 Atl. 14.

(b) For Death of Husband and Father.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 236, No. 3, p. 150, and Vol. II, p. 134.

Particular Amounts.

When the total amount of the damages awarded under the Federal Employers' Liability Act for the benefit of a widow and two minor children is not excessive, the defendant is not prejudiced because the jury awarded $4,000 to each of the beneficiaries. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

A verdict for $20,000 was held excessive in an action based on the Federal Employers' Liability Act for the death of a switchman who left a widow and three small children, and a new trial was ordered unless the verdict was remitted down to $16,000. Castle v. Union Pac. R. Co., — Minn. —, 166 N. W. 767.

A verdict for $35,000 for the death of an engineer 37 years old, who earned $125 monthly, which would have been increased to $200 to $225 per month held not excessive in an action under the Federal Employers' Liability Act for the benefit of his widow and five children, to whom he was devoted and to whom he rendered valuable services by way of advice and training. Gulf, Colorado & Santa Fe R. Co. v. Carpenter, — Tex. Civ. App. —, 201 S. W. 270.

An award of $3,000 for the death of a husband who had a life expectancy of 23 years, and who earned $45 a month, is not excessive in an action under the Federal Employers' Liability Act. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544,

37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

Award to Adult Child.

The award of one dollar to an adult daughter for the death of her father in an action under the Federal Employers' Liability Act for her benefit and that of her mother is, as to the defendant, within the maxim de minimis non curat lex, when such award does not even affect the cost of the suit. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup Ct. Rep. 334.

(c) For Death of Son.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 237-238, and Vol. II, p. 135.

In General.

The defendant is entitled to a reversal of an entire judgment, in an action under the Federal Employers' Liability Act for the benefit of surviving parents, where the damages awarded for the benefit of one of them are excessive. Pittsburgh, C., C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Particular Amounts.

A verdict for $3,500 in favor of a mother 57 years of age, in an action under the Federal Employers' Liability Act, is sufficiently supported by evidence that a young son rendered material assistance on her farm before entering the employ of the defendant, and that during the three weeks he was in the latter's services from his earnings he sent his mother money to discharge their joint obligation. Pittsburgh, C., C. & St. L. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

A verdict for $6,500 in favor of a father who has an expectancy of but 11.48 years, is excessive in an action under the Federal Employers' Liability Act for the death of a son who earned about $100 a month. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

G. Curing Excessive Verdict by Remittiture.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 238.

(No new decisions.)

H. Capacity in Which Fund Held by Personal Representative.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 239.

(No new decisions.)

I. Disposition of Amount Recovered.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 239, and Vol. II, p. 136.

(No new decisions.)

XVIII. EVIDENCE.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 239-262, No. 3, pp. 151-153, No. 4, pp. 51-52, and Vol. II, pp. 136-142.

A. Judicial Notice.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 239, and Vol. II, p. 136.

(No new decisions.)

B. Presumptions.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 240, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 136.

5. Negligence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 240, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 136.

Effect of state laws creating presumptions of negligence, see supra XVI, D, 3, (f).

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 240, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 136.

In General.

In an action under the Federal Employers' Liability Act no presumption of negligence arises from the proof of the killing of an employee by a railway company. Eggler v. Southern R. Co., — Ga. App. —, 79 S. E. 93.

There is no presumption of negligence in an action under the Federal Employers' Liability Act. Louisville & Nashville R. Co. v. Hixon, — Ga. App. —, 97 S. E. 554.

It will not be presumed in an action based on the Federal Employers' Liability Act that a block signal failed to operate properly at the time an engineer ran past it and collided with a preceding train where there is no direct evidence that the

signal was not in order and working properly. Lyman v. Delaware & Hudson Co., — App. Div. —, 170 N. Y. Supp. 412.

(b) Res Ipsa Loquitur.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 240, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 136.

In General.

The fact of the happening of an accident causing injury to an employee carries with it no presumption of negligence on the part of the master in an action founded on the Federal Employers' Liability Act, such negligence being an affirmative fact for the plaintiff to establish by evidence. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161; Missouri, Kansas & Texas R. Co. v. Taylor, —Okla. —, 170 Pac. 1148.

C. Burden of Proof.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 241-244, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 137.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 242, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 137.

Common-Law Rules.

The common-law rules as to the burden of proof were not altered by the Federal Employers' Liability Act. Washington-S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

To Prove Case.

The burden is on the plaintiff to make out a case under the Federal Employers' Liability Act by proof of every essential element. Eggler v. Southern R. Co., — Ga. App. —, 79 S. E. 93.

3. Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 242, No. 3, p. 151, No. 4, p. 51, and Vol. II, p. 137.

Employee.

The burden of showing that a servant was not engaged in interstate commerce at the time he was injured rests on the defendant in an action based on the Federal Employers' Liability Act, where the plaintiff makes out a prima facie showing of such employment. Southern Pac. Co. v. Stephens, — Tex. Civ. App. —, 201 S. W. 1076.

The defendant need not offer evidence to support a claim that a railway employee was engaged in interstate commerce at the time he was injured, when the plaintiff's evidence discloses such fact. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

5. Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 243, No. 4, p. 51, and Vol. II, p. 137.

In General.

The burden rests on the plaintiff to show the negligence of the defendant in an action under the Federal Employers' Liability Act. Western Maryland R. Co. v. Sanner, 130 Md. 581, 101 Atl. 587, certiorari denied 245 U. S. 661, 62 L. ed. —, 38 Sup. Ct. Rep. 61.

The plaintiff has the burden of showing negligence in an action governed by the Federal Employers' Liability Act. Yazoo & Mississippi Valley R. Co. v. McCaskell, — Miss. —, 79 So. 817.

7. Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 243, and Vol. II, p. 137.

In General.

The defendant has the burden of proof, in an action governed by the Federal Employers' Liability Act, of showing assumed risk. King v. Norfolk & Southern R. Co., — N. C. —, 79 S. E. 29.

D. Admissibility of Evidence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 244-256, No. 3, pp. 151-152, No. 4, pp. 51-52, and Vol. II, pp. 138-141.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 244, No. 3, p. 151, No. 4, pp. 51-52, and Vol. II, p. 138.

Pain and Suffering.

When the plaintiff proceeds to trial on a complaint for pecuniary damages to next of kin under the Federal Employers' Liability Act for wrongful death, and refuses when given an opportunity to amend his complaint so as to cover a right of action for the pain and suffering of the decedent, it is error to admit evidence pertaining to the latter cause of action. Lennon v. Erie R. Co., — N. J. —, 104 Atl. 444.

Employment in Interstate Commerce.

When employment in interstate commerce is not pleaded by either party to a railway servant's action for personal in-

juries, the defendant cannot affirmatively show such employment as a defense to an action under the state law. Breen v. Iowa Cent. R. Co., — Iowa, —, 168 N. W. 901, S. C. 159 Iowa, 537, 141 N. W. 410.

When neither party pleads employment in interstate commerce in an action for injuries to a railway employee, and the plaintiff's evidence shows that he was engaged in intrastate commerce, the defendant cannot show by cross-examination that both were engaged in interstate commerce at the time of the accident. Breen v. Iowa Cent. R. R. Co., — Iowa, —, 168 N. W. 901, S. C. 159, Iowa, 537, 141 N. W. 410.

Time Table.

A time table showing automatic electric semaphore and block signals in connection with a station a mile from where a train struck and killed a servant, but at which such train was not scheduled to stop, is not admissible in evidence in an action under the Federal Employers' Liability Act. Casey v. Boston & Maine R. Co., — Mass. —, 121 N. E. 403.

Certified Copy of Foreign Records.

A copy of the municipal "population docket" of an Italian city, certified by the mayor thereof, showing who are the dependents of a decedent, is not admissible in an action under the Federal Employers' Liability Act, although the treaty with such country provides for the admission in evidence of "official documents" of all kinds when duly authenticated by consul generals, vice-consuls and consular agents. Santomassimo v. New York, Susquehanna & Western R. Co., — N. J. —, 105 Atl. 14.

2. Admissions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 245, and Vol. II, p. 138.

Reports to Industrial Accident Board.

A report of a fatal accident made by a railway company to a state Industrial Accident Board, as required by the state law, is not admissible as an admission of negligence in an action under the Federal Employers' Liability Act for the death of a servant. Casey v. Boston & Maine R. Co., — Mass. —, 121 N. E. 403.

Effect of Admissions.

The admission by the defendant of the truth of the averments of the plaintiff's petition in an action based on the Federal Employers' Liability Act, as to his employment as well as that of the defendant in interstate commerce, dispenses with the necessity for proof thereof. Burke v. Michigan Central R. Co., 96 Ohio, 496, 118 N. E. 111.

4. Circumstantial Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 245, No. 4, p. 51, and Vol. II, p. 138.

Cause of Death.

The cause of the death of an employee may be shown by circumstantial evidence in an action under the Federal Employers' Liability Act. Castle v. Union Pac. R. Co., — Minn. —, 166 N. W. 767.

5. Conclusions, Opinions and Expert Testimony.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 246, and Vol. II, p. 138.

(c) Opinions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 246.

Proper Method of Driving Spikes.

Since it is self-evident that the heads of railway spikes or parts thereof, are liable to break off even when struck a direct blow with a maul, opinion evidence is not admissible, although its admission is not reversible error, in an action under the Federal Employers' Liability Act, to show the proper method of driving spikes. Ruping v. Oregon Short Line R. Co., — Utah —, 171 Pac. 145.

7. Custom.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 248, No. 4, p. 51, and Vol. II, p. 139.

To Show Negligence.

A custom or practice of a railway company to run a work train by a station on the passing instead of the main track, may be shown in an action under the Federal Employers' Liability Act for the death of a sectionman who was struck by such train when running on the main track contrary to such practice. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

8. Damages.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 248-249, and Vol. II, p. 139.

(d) Financial Condition.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 248, and Vol. II, p. 139.

Of Decedent.

As tending to prove dependency it may be shown, in an action under the Federal

Employers' Liability Act, that at the time of his death the decedent did not have any property other than his wages, and no insurance, with which to support his family, and that neither his widow nor his children had any property of their own. Dutton v. Atlantic C. L. R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion 245 U. S. 673, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

20. Res Gestae.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 255, No. 3, p. 152, No. 4, p. 52, and Vol. II, p. 140.

In General.

A declaration made by a person immediately after he was fatally injured by an explosion of fuel oil, tending to show that it was caused by the carelessness of a foreman, is admissible as part of the res gestæ in an action under the Federal Employers' Liability Act when such declaration was made under great excitement and under circumstances precluding any design to falsify. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

E. Weight and Sufficiency.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 256-260, No. 3, p. 152, and Vol. II, p. 141.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 256, No. 3, p. 152, and Vol. II, p. 141.

Sufficiency of Evidence to Take Case to Jury.

The question of the negligence of the defendant should not be submitted to the jury in an action under the Federal Employers' Liability Act for the death of an engineer in a rear-end collision, where the evidence does not show that the block system was not in order or that it did not operate at the time the decedent's train entered the block so as to give him warning of the presence of the preceding train. Lyman v. Delaware & Hudson Co., — App. Div. —, 170 N. Y. Supp. 412.

6. To Sustain Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 259, No. 3, pp. 152-153, and Vol. II, p. 141.

In General.

The fact that the verdict, in an action under the Federal Employers' Liability Act, may not be in accord with the testimony of a majority of the witnesses does not furnish reasons for setting it aside, since mere numerical superiority of witnesses on one side does not constitute preponderance of proof. Cincinnati, N. O. & T. P. R. Co. v. Goode, 169 Ky. 102, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 163 Ky. 60, 173 S. W. 329, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

F. Demurrer to Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 260, and No. 3, p. 153.

(No new decisions.)

G. Scope of Issues.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 260.

(No new decisions.)

H. Variance and Failure of Proof.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 261, and Vol. II, p. 142.

In General.

There is no material variance in an action under the Federal Employers' Liability Act for the death of a sectionman who was struck by a train, where the complaint alleged that at the time of the accident he was on his way to the depot, and the evidence tended to show that he was on his way to his place of work or was walking on the track waiting for his work to begin. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

I. Credibility and Conduct of Witnesses.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 261, No. 3, p. 153, and Vol. II, p. 142.

(No new decisions.)

J. Examination of Witnesses.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 261.

(No new decisions.)

XIX. TRIAL.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 262-323, No. 3, pp. 153-158, No. 4, pp. 52-54, and Vol. II, pp. 142-162.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 262, and No. 4, p. 52.

(No new decisions.)

B. Questions for Court.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 263-264, No. 3, p. 153, No. 4, p. 53, and Vol. II, p. 142.

3. Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 263, and No. 4, p. 52.

In General.

The question of assumption of risk one of law is for the court in an action under the Federal Employers' Liability Act, where the evidence is undisputed and an employee's injury was not caused by the carrier's violation of any statute enacted for the protection of employees. Chicago, Rock Island & Pac. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161.

C. Submitting Case or Question to Jury.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 264-282, No. 3, pp. 153-155, No. 4, pp. 52-53, and Vol. II, pp. 143-144.

2. Sufficiency of Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 264-266, and Vol. II, p. 144.

(c) To Take Particular Questions to Jury.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 264-266, and Vol. II, p. 144.

In General.

In an action under the Federal Employers' Liability Act for the death of a switchman as the alleged result of slipping on loose coal negligently left on the foot board of an engine, the evidence was held sufficient to make a question for the jury whether the footboard was so obstructed. Castle v. Union Pac. R. Co., — Minn. —, 166 N. W. 767.

The evidence held sufficient to take to the jury, in an action under the Federal Employers' Liability Act, the question whether, at the close of his day's work, an engineer was leaving a carrier's premises by the proper and usual way, when he was struck and killed by a backing locomotive, where it appeared that engineers were permitted, at the end of their runs, to ride to the roundhouse with the engine dispatcher if they chose to do so, and that such was almost the universal practice of the decedent, and that, without objection from the defendant, employees used a large space near the roundhouse in crossing the tracks in going to and from their work. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

3. Questions for Jury.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 266-282, No. 3, pp. 153-155, No. 4, p. 52, and Vol. II, pp. 144-150.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 266, No. 3, p. 153, No. 4, p. 52, and Vol. II, p. 144.

Controlling Law.

When the evidence in an employee's action for injuries makes an issue of fact as to whether the state law or the Federal Employers' Liability Act is applicable, the court should leave the question to the jury to decide and then apply the applicable law. Ettison v. Southern R. Co., — S. C. —, 96 S. E. 680.

Warning of Latent Danger.

When a servant was injured while unloading poles from a car, in consequence of a concealed spike in a pole, which while obeying instructions, he could not see and of which he was not warned, the negligence of the defendant is a question for the jury in an action based on the Federal Employers' Liability Act. Cornell v. West Jersey & Seashore R. Co., — N. J. —, 103 Atl. 380.

Negligence in General.

When a roundhouse helper attempted to move a turntable by hand on the failure of the electric motor to work, and he was injured by the sudden starting of the motor in consequence of the current not having been cut off from the motor, of which he was not aware, the question of the negligence of the defendant is for the jury in an action under the Federal Employers' Liability Act. Ft. Worth & Denver City R. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049.

When a standard on a car loaded with cross-ties broke and permitted one of them to fall or be thrown from a rapidly-moving train onto a section hand, the question of negligence is for the jury in an action under the Federal Employers' Liability Act. Yazoo & Mississippi Valley R. Co. v. McCaskell, — Miss. —, 79 So. 817.

The negligence of the defendant is a question for the jury in an action under the Federal Employers' Liability Act for the death of a section man who was killed by the collision of a hand car with an extra train which was running through a heavy fog without having the headlight burning. Williams v. Chesapeake & Ohio R. Co., — Ky. —, 204 S. W. 292.

The question of the defendant's negligence, as well as of proximate cause, is for the jury in an action based on the Federal Employers' Liability Act, for the death of a brakeman who, while leaning from the side of an engine inspecting a hot box, was struck and killed by the timbers of a bridge, where the steam escaping from the movable joint of a Mallet type of locomotive was so dense as to obscure the bridge. Ball v. Northern Pac. R. Co., — Wash. —, 173 Pac. 1029.

The question of the defendant's negligence is for the jury, subject to the defense of assumed risk, in an action under the Federal Employers' Liability Act for the death of a switchman who at night was struck by a backing train which did not display a white light on the front end of the leading car as required by the rules of the defendant company. Atlantic Coast Line R. Co. v. Selden. — C. C. A. —, 249 Fed. 122.

Where, on a foggy night, while riding shunted cars down a silght grade on a repair track, a switchman was killed in a collision with a loaded car, the question of the defendant's negligence is for the jury in an action under the Federal Employers' Liability Act. Cincinnati, New Orleans & Texas Pac. R. Co. v. McGuffey, — C. C. A. —, 252 Fed. 25.

(c) Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 267, No. 3, pp. 153-154, No. 4, p. 52, and Vol. II, p. 145.

In General.

The question of assumption of risk is, under the Indiana rule, a question for the jury in an action under the Federal Employers' Liability Act. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

Whether a risk of injury is an ordinary incident to his employment or an extraordinary one known to a servant, or with knowledge of which he is chargeable, is a question for the jury in an action under the Federal Employers' Liability Act. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

It is for the jury to determine, in an action under the Federal Employers' Liability Act, whether an employee assumed the risk of injury from obeying a direct command of the master. Vandalia R. Co. v. Kendall, — Ind. App. —, 119 N. E. 816.

Whether the risk of injury from a servant turning a current of electricity of high voltage into a wire about which the plaintiff was working was so obvious that the latter assumed the risk of injury, is a question for the jury in an action based on the Federal Employers' Liability Act. Fried v. New York, New Haven & Hartford R. Co., — App. Div. —, 170 N. Y. Supp. 697.

Whether a switchman assumed the risk of injury from the negligence of a foreman in causing cars to be stopped with a jerk, is a question for the jury in an action based on the Federal Employers' Liability Act. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

Whether the failure to uncouple cars and their sudden stoppage in consequence with a jerk was an unusual risk which a switchman assumed, is a question for the jury in an action under the Federal Employers' Liability Act. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

If the jury find that the defendant, in an action under the Federal Employers' Liability Act, was negligent in using a Mallet type of locomotive in such a condition that the moveable joints of the boiler permitted excessive quantities of steam to escape and to obscure a brakeman's view of the approach to a bridge, the question of assumed risk is for the jury, where he had passed over the road many hundred times and was aware of the narrowness of the bridge. Ball v. Northern Pac. R. Co., — Wash. —, 173 Pac. 1029.

Whether an employee assumed the risk of injury to his eyes from using an emery wheel without protecting his eyes with goggles, is a question for the jury in an action based on the Federal Employers' Liability Act, where different conclusions may be drawn from the evidence, and negligent treatment of the plaintiff's eyes is alleged. Kuchenmeister v. Los Angeles & Salt Lake R. Co., — Utah —, 172 Pac. 725.

Where, while in the line of his duty, a servant was knocked from the running board of a car and killed when a coemployee struck with his foot and knocked to the ground a plank which another servant was carrying on the car to his home for firewood, the question of assumed risk is for the jury in an action under the Federal Employers' Liability Act, when the evidence is not conclusive that the danger was obvious. Lennon v. Erie R. Co., — N. J. —, 104 Atl. 444.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman who, in the night time, as he stepped from a slowly moving engine, collided with a car which was not in the clear on a sidetrack. Mills v. Roberts, — Ark. —, 206 S. W. 751.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a section hand, who never before had worked about a wreck, when a rail flew from a pile of wreckage as power was applied to a pair of trucks by a wrecking

crew to remove them from the debris. McDougall v. Chicago & Northwestern R. Co., — Wis. —, 170 N. W. 266.

Passing Trains.

Whether a section man assumed the risk of injury from a passing train is a question for the jury in an action under the Federal Employers' Liability Act, where the customary track was not used, and there was a negligent failure to give timely warning of the approach of the train when the presence of the decedent and his apparent unconsciousness of danger were perceived by the engineer. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act, where a section man was injured while hastily removing a hand car from a track in a curved cut in order to avoid an approaching belated train, where, although the rules of the employer required a flagman to be sent forward in such places, the foreman on approaching the cut, merely stopped his car and listened without hearing such train, he having been informed before starting on his trip by a telegraph operator that there was ample time to reach his destination before meeting such train. Atlantic Coast Line R. Co. v. Tomlinson, — Ga. App. —, 94 S. E. 909.

Mail Crane Close to Track.

Where an engineer, while leaning 14 inches from the side window of the cab of a locomotive in the discharge of his duties, was struck and injured by a mail crane beside the track, the question of assumed risk is for the jury in an action under the Federal Employers' Liability Act. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323.

(f) Contributory Negligence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 270, No. 3, p. 154, No. 4, p. 52, and Vol. II, p. 147.

In General.

The question of contributory negligence is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman who, in the night time, in stepping from a slowly-moving engine, collided with a car which was not in the clear on a sidetrack. Mills v. Roberts, — Ark. —, 206 S. W. 751.

Whether an employee was guilty of contributory negligence in using an emery wheel without protecting his eyes with goggles, is a question for the jury in an action under the Federal Employers' Liability Act, where different conclusions may be drawn from the evidence and negligent treatment by such employee of his injured eye is alleged. Kuchenmeister v. Los Angeles & Salt Lake R. Co., — Utah —, 172 Pac. 725.

The question of contributory negligence is for the jury in an action under the Federal Employers' Liability Act, where in the discharge of his duties a switchman was caught and killed between the outer edge of a curved platform and the side of an extraordinary long car which left a clearance of but five inches. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

(g) Custom.

In General.

Where while riding on the running board of a car in the line of his duty a servant was knocked therefrom and killed when another employee, while passing along the running board, struck his foot against a plank which another servant was taking home for firewood, one end falling to the ground and the other striking the decedent, the question of the existence of a custom of servants to carry planks and boards on cars, sufficient to charge the defendant with failing to provide the decedent with a safe place, held a question for the jury in an action under the Federal Employers' Liability Act. Lennon v. Erie R. Co., — N. J. —, 104 Atl. 444.

(i) Defective Appliances and Tools.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 272, and Vol. II, p. 148.

In General.

The question of the defective condition of a trip hammer is for the jury in an action under the Federal Employers' Liability Act, where the evidence shows that the hammer fell after it was raised and the lever set, which it should not have done had it been in proper condition. Southern Pac. Co. v. De La Cruz, — Tex. Civ. App. —, 201 S. W. 428.

(j) Defective Ways and Premises.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 273, and Vol. II, p. 148.

Obstruction in Path Between Tracks.

Whether it was negligence to leave a jack block between two tracks in a railway yard is a question for the jury in an action under the Federal Employers' Liability Act, although it did not appear that the block had been in such position for any length of time before an employee stumbled over it to his injury when attempting to board a moving train, where the block lay on a cinder path which was maintained between the tracks and kept in a smooth, level and unobstructed condi-

tion for the use of yard employees. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Tracks Close Together.

Where a messenger boy, while standing between parallel tracks reading telegraphic orders to the conductor of a passing train at a point where the tracks were so close together that the former did not have room to perform his duties in safety, was struck and killed by a backing engine on the other track, which gave no warning of its approach and no lookout was kept, and the evidence of the defendant tended to show that there was ample room between the tracks for one to stand in safety when trains were passing on both tracks, in an action under the Federal Employers' Liability Act, the question of the negligence of the defendant was for the jury. Davis v. Southern R. Co., — N. C. —, 96 S. E. 41.

Freight Platform Close to Track.

The question of the negligence of the defendant is for the jury in an action based on the Federal Employers' Liability Act, in constructing a curved platform with a clearance of but five inches between its outer edge and the side of an extraordinary long car between which a switchman was crushed. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

Car Not in Clear.

The question of the negligence of the defendant in an action under the Federal Employers' Liability Act, held for the jury where a brakeman in stepping from a slowly-moving engine in the night time, was injured by colliding with a car which was not in the clear on a sidetrack. Mills v. Roberts, — Ark. —, 206 S. W. 751.

(m) Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 275, No. 3, p. 153, No. 4, p. 52, and Vol. II, p. 149.

In General.

The question of employment in interstate commerce is for the jury where a section hand was injured while loading rails onto a car for transportation to a place on an interstate line for repair work. Probus v. Illinois Cent. R. Co., — Ky. —, 203 S. W. 862.

The question whether a servant was engaged in interstate commerce is for the jury in an action founded on the Federal Employers' Liability Act, where he was killed while unloading on a trestle coal from a car which came from another state, and had he not been killed, he would, in a short time, have loaded some of the coal on engines engaged in both interstate and intrastate commerce. Squire v. Southern R. Co., — S. C. —, 96 S. E. 152.

The question of employment in interstate commerce is for the jury in an action based on the Federal Employers' Liability Act, where a servant was injured while placing on a storage track for the night a locomotive which had just been coaled, watered and sanded after the completion of its regular daily interstate trip to which it was permanently devoted. Palermo v. Erie R. Co., — App. Div. —, 173 N. Y. Supp. 456.

(q) Negligence of Fellow Servants.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 277, No. 3, p. 154.

In General.

When the negligence of an employee contributed to his injury, an action under the Federal Employers' Liability Act should be submitted to the jury under proper instructions, where the negligence of a coemployee was also a proximate cause of the accident. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed, 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

The question of the negligence of the defendant was properly left to the jury, in an action based on the Federal Employers' Liability Act for the death of a brakeman in a rear end collision, where it appeared that, notwithstanding the negligence of the decedent in failing to signal the following train, which in a snow storm ran past a block signal, those in charge of such train were aware of the proximity of the decedent's train, and the train dispatcher was also negligent in stopping the decedent's train to move the disabled engine of another train, rather than requiring the following train to do so. Union Pac. R. Co. v. Hadley, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 318, affirming 99 Neb. 349, 156 N. W. 765.

Where a brakeman was thrown from a car at night when a cut of cars struck a stationary car on a house track, the question of the defendant's negligence was for the jury in an action under the Federal Employers' Liability Act, when the evidence tends to show that a brakeman at the head of the cut of cars did not keep a proper lookout for obstructions. Porter v. Louisville & Nashville R. Co., — Ala. —, 78 So. 375.

Where an employee was killed by the derailment of a weed burned when moved in a train with one wing lowered, which permitted it to strike an obstruction, the question of the defendant's negligence is for the jury in an action under the Fed-

eral Employers' Liability Act, where neither the conductor, brakeman, engineer, fireman, or roadmaster, who were on the train, attempted to ascertain whether the wings of the burner were in a position of safety. Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

The question of the negligence of the defendant is for the jury in an action based on the Federal Employers' Liability Act, for injuries sustained by a hostler in consequence of the negligence of an inspector in not ascertaining the position of the hostler before moving a smoke deflector on an engine, where the inspector, had he used due care, could have discovered the other's position in time to avert the accident. Cincinnati, New Orleans & Texas Pac. R. Co. v. Morgan, — Tenn. —, 201 S. W. 128.

The question of the defendant's negligence is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by the conductor of a work train in a rear end collision in consequence of the negligence of the rear brakeman in flagging a following train, to which the train dispatcher failed to give notice that the more slowly moving train was preceding it. Eley v. Chicago Great Western R. Co. — Iowa, —, 166 N. W. 739.

The question of the defendant's negligence is for the jury in an action under the Federal Employers' Liability Act, where an engineer alone backed a locomotive through a railway yard at a place where employees customarily crossed the tracks on their way to and from work, without looking from the fireman's side to see if the way was clear, and the engineer's view of the further rail was obstructed for a distance of 140 feet by the tender and the heaped up coal. Ewig v. Chicago, Milwaukee & St. Paul R. Co., — Wis. —, 167 N. W. 442.

The negligence of a foreman of a switching crew in failing to warn a switchman of the presence of a loaded car on a repair track before the latter, on a foggy night, rode shunted cars thereon, is a question for the jury in an action under the Federal Employers' Liability Act for the death of the switchman in a resulting collision. Cincinnati. New Orleans & Texas Pac. R. Co. v. McGuffey, — C. C. A. —, 252 Fed. 25.

(r) Rules.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 278, No. 3, pp. 153-154, and Vol. II, p. 149.

Violation as Negligence. — Sounding Whistle.

When the rules of a carrier require, for the protection of those on a track, that engineers sound the whistle when rounding curved cuts, it is a question for the jury, in action under the Federal Employers' Liability Act for the death of a section hand whose car was struck by a train, whether the whistle was blown at such a time as to give sufficient warning to the decedent to permit him to avoid the collision. Baird v. Northern Pac. R. Co., — Wash. —, 170 Pac. 1016.

(t) Proximate Cause.

See also same section Vol. I, No. 2, p. 280, and Vol. II, p. 149.

In General.

The question of proximate cause is for the jury in an action under the Federal Employers' Liability Act for the death of a servant who, while transferring mail across a track at a station from one train to another, was struck by a backing locomotive which gave no warning of its approach and which was obscured by smoke and steam. Hudson v. Seaboard Air Line R. Co., — N. C. —, 97 S. E. 388.

(v) Violent and Unusual Movement of Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 280.

In General.

Whether a section hand in a collision between two hand cars was injured wholly or partially because of his own negligence in stopping his own car too suddenly, held a question for the jury in an action under the Federal Employers' Liability Act. Miller v. Ann Arbor R. Co., 196 Mich. 297, 162 N. W. 1025.

Whether the failure to uncouple cars and their sudden stoppage in consequence is negligence, is a question for the jury in an action under the Federal Employers' Liability Act for resulting injuries to a switchman. Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

Excessive Speed.

Whether it is negligence to run a work train at high speed past a station is a question for the jury in an action under the Federal Employers' Liability Act for the death of an employee who was struck by the train. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

(w) Warning of Danger.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 280, and Vol. II, p. 150.

In General.

The question whether it was negligence for the defendant to fail to warn a section hand, who had never before worked about

a wreck, of the danger of working near the wreckage when the wrecking crew applied power to a pair of trucks to remove them from the debris, from which a rail flew and injured the plaintiff, is for the jury in an action under the Federal Employers' Liability Act. McDougall v. Chicago & Northwestern R. Co., — Wis. —, 170 N. W. 266.

D. View by Jury.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 282.

(No new decisions.)

E. Instructions.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 282-312, No. 3, pp. 155-157, No. 4, pp. 52-53, and Vol. II, pp. 150-160.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 282, No. 3, p. 155, No. 4, pp. 52-53, and Vol. II, p. 150.

Abstract Instructions.

An abstract instruction based on a portion of section one of the Federal Employers' Liability Act, held not prejudicial to the defendant. Meier v. Cleveland, Cincinnati, Chicago & St. Louis R. Co., 206 Ill. App. 285, certiorari denied by supreme court.

Speed of Trains.

In an action under the Federal Employers' Liability Act for wrongful death of a section man who was struck by a train, the jury was correctly instructed to the effect that, as a matter of law, a railway company has the right and is expected to run its trains at high rates of speed, and unless there are some exceptional circumstances which would cause a reasonably prudent person to run a train at a low speed, the company has the right to use as high a speed as it desires, especially where the jury was further instructed that the rate of speed was not of itself negligence, but should be regulated with due and reasonable regard to the location, circumstances and dangers, if any, to its employees who are necessarily or lawfully along the tracks; and that the question whether the speed of a train was negligence under the circumstances, is a question of fact. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

What Law Controls.

When it appears as a matter of law, upon undisputed evidence, that neither the state law or the Federal Employers' Liability Act is the law applicable to an action for personal injuries, it becomes the duty of the court to instruct the jury to apply the one or the other as the case may be. Ettison v. Southern R. Co., — S. C. —, 96 S. E. 680.

Federal Law.

It is not reversible error to instruct as to the entire Federal Employers' Liability Act, if the jury is not thereby misled. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54.

2. Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 283-286, No. 3, p. 155, No. 4, pp. 52-53, and Vol. II, p. 151.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 283, No. 3, p. 153, No. 4, pp. 52-53, and Vol. II, p. 151.

Structures Near Track.

An instruction requested by the defendant, in an action for injuries received by a brakeman, to the effect that he assumed the risk of injury from the construction of coal bins too close to a track if a person of ordinary prudence would not have continued in the service with knowledge of the danger or defect, relates to common-law assumption of risk and not to a state statute so as to constitute a waiver by the defendant of the right to have the case tried under the common-law rules as affected by the Federal Employers' Liability Act. Chicago, R. I. & G. R. Co. v. DeBord, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667, certiorari denied 245 U S. 652, 62 L. ed. —, 38 Sup. Ct. Rep. 12.

(b) Risks of Employment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 248, No. 3, p. 155.

In General.

An instruction is erroneous in an action under the Federal Employers' Liability Act, when to the effect that a servant assumes only the ordinary perils and risks of the service, and excluding other perils and risks even though he knew of them and continued to work without complaint or promise to correct them. Bradley v. Vandalia R. Co., 207 Ill. App. 592.

Passing Trains.

An instruction to the effect that a sectionman assumed the risk of injury, as an incident of his service, of being struck by passing trains run in the usual and ordinary way, was properly refused in an

action under the Federal Employers' Liability Act, because disregarding the habitual neglect of the defendant to give proper warning signals, and other negligent operations of its trains. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

(d) Negligence of Employer.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 285, No. 3, p. 155, No. 4, p. 53, and Vol. II, p. 152.

In General.

It is error to instruct the jury in an action based on the Federal Employers' Liability Act, that an employee does not assume the ordinary risks of injury growing out of the negligence of the master, since a servant assumes all ordinary risks of which he is aware or which would be known to a person of reasonable prudence and diligence by the exercise of ordinary care. Kansas City, Mexico & Orient R. Co. v. Costa, — Okla. —, 170 Pac. 892.

5. Contributory Negligence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 287-294, No. 3, pp. 155-156, and Vol. II, 153.

(a) In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 287, and No. 3, p. 155.

In General.

Instructing the jury as to contributory negligence, and stating that the defendant insisted upon a plea thereof, is not prejudicial to the defendant in an action under the Federal Employers' Liability Act, although in fact no such plea was made and the evidence failed to show such negligence. Louisville & Nashville R. Co. v. Wright, — Ala. —, 80 So. 93.

An instruction as to contributory negligence in an action under the Federal Employers' Liability Act, held not erroneous, although omitting to show that there could not be a recovery of full damages if the plaintiff was guilty of contributory negligence, and the method of reduction, where other instructions gave the correct limitation. Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 54.

An instruction in an action under the Federal Employers' Liability Act is not materially misleading where it requires that any negligence of a servant must have proximately contributed to his injury before it can be considered in reduction of damages. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

Failure to Instruct.

The failure to instruct the jury in the general charge as to contributory negligence in an action under the Federal Employers' Liability Act, is not error, where the testimony did not raise such issue and a special charge on the subject was given at the request of the defendant. Gulf, Colorado & Santa Fe R. Co. v. Carpenter, — Tex. Civ. App. —, 201 S. W. 270.

Use of Defective Boiler.

In an action under the Federal Employers' Liability Act for the death of an engineer caused by the explosion of a locomotive boiler, the jury was correctly instructed to the effect that it was not contributory negligence for the decedent to use an oil burning engine equipped with an improper type of crownsheet bolts having large button heads, for which the defendant failed to provide fusible safety plugs, and also negligently permitted scale to accumulate on the crownsheet. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed.—, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

Walking on Track.

The addition of the words "some degree" to an instruction that, as a matter of law, a section man was guilty of some degree of negligence in walking on and along a railway track without keeping a vigilant lookout for trains by both looking and listening, was not erroneous in an action based on the Federal Employers' Liability Act. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

(h) Reduction of Damages For.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 290-294, No. 3, p. 156, and Vol. II, p. 153.

In General.

The jury should be instructed, in an action under the Federal Employers' Liability Act, that for the contributory negligence of the plaintiff they should diminish his damages in proportion to the amount of negligence attributable to him, so that instead of recovering his full damages he would receive only a proportionate part, bearing the same relation to the full amount as the negligence attributable to the defendant bore to the entire negligence of both. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

An instruction that, in an action under the Federal Employers' Liability Act, the plaintiff's damages must be reduced for

his contributory negligence to the extent that it was found to have contributed to his injury, was erroneous. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

An instruction, in an action based on the Federal Employers' Liability Act, to the effect that if the plaintiff was guilty of contributory negligence the jury should by its verdict, state the amount of damages the plaintiff sustained, and also how much should be deducted therefrom for such negligence, was erroneous. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

An instruction in an action under the Federal Employers' Liability Act, that if the plaintiff was guilty of negligence contributing to his injury, his damages "should be by you diminished in proportion to the amount of negligence attributable to the plaintiff" is not erroneous. Sells v. Grand Trunk Western R. Co., 206 Ill. App. 45, certiorari denied by supreme court.

It is error to instruct the jury as to damages under the Federal Employers' Liability Act and to ignore the reduction thereof for contributory negligence. Bradley v. Vandalia R. Co., 207 Ill. App. 592.

An instruction that in an action under the Federal Employers' Liability Act for wrongful death the plaintiff could recover only for the actual pecuniary loss sustained, less such amount as the jury might deduct for contributory negligence, held not erroneous. Northern Trust Co. v. Grand Trunk R. Co., 207 Ill. App. 11.

An instruction as to contributory negligence held erroneous, in an action based on the Federal Employers' Liability Act, when to the effect that if the decedent was found guilty of negligence which contributed to his death it would "authorize" the jury to deduct from the total damages a sum equal to the proportion that negligence bore to the whole causal negligence, since such instruction did not imperatively require the jury, in conformity to the statute, to diminish the damages for such cause. Crecelius v. Chicago, Milwaukee & St. Paul R. Co., — Mo. —, 205 S. W. 181.

If, in an action under the Federal Employers' Liability Act, the jury is instructed to proportionately reduce the damages for contributory negligence, it is not erroneous to use the term "full measure" of damages to express the rule if no such negligence is shown. Jones v. Norfolk Southern R. Co., — N. C. —, 79 S. E. 48.

6. Damages.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 294-300, No. 3, p. 156, and No. 4, pp. 152-153.

(a) In General.

Loss of Earning Power.

An instruction as to damages for the impairment or loss of earning power held correct in an action under the Federal Employers' Liability Act, where the defendant did not request a more specific instruction, and that given was to the effect that the jury should award a sum that would represent the present cash value of such labor and any money that might be earned thereby, so far as the injury may have impaired or destroyed the servant's earning power, and that if anything was allowed for the loss of time and for the impairment of his ability to labor, it should not begin until after and subsequent to the time for which damages for loss of time was awarded. Ohio Valley Electric Co. v. Brumfield, — Ky. —, 203 S. W. 541.

Punitive Damages.

An instruction as to punitive damages is proper in an action based on the Federal Employers' Liability Act for the death of an employee caused by a defective electric lamp which the master required to be used for a week after receiving notice of its condition. Ennis v. Yazoo & Mississippi Valley R. Co., — Miss. —, 79 So. 73.

Present Worth of Award.

When estimates of the present worth of the damages are not obviated by the instructions actually given in an action under the Federal Employers' Liability Act, and the verdict is not excessive, the defendant, by failing to offer proper instructions, waives the objection that the recovery should have been limited to the present value of the loss of future earnings. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

The defendant is entitled to an instruction that in estimating what would compensate a widow under the Federal Employers' Liability Act for the death of her husband, future benefits must be considered at their present value, where the jury was instructed that the plaintiff was entitled to recover such damages as would fairly and reasonably compensate her for the loss of the pecuniary benefits she would reasonably have received but for the death of her husband. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

The failure of the court to instruct that the damages awarded under the Federal Employers' Liability Act for the death of a husband, should be based on the present worth thereof, is not erroneous where the defendant did not ask an instruction to that effect. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

For Benefit of Minors.

An instruction in an action under the Federal Employers' Liability Act as to awarding damages for the benefit of minor children held to limit recovery to the period of their minority, although the instruction did not expressly say so. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

(c) Contributory Negligence.

Instructions as to reduction of damages for contributory negligence, see supra XIX, E, 5, (h).

(d) Death.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 297, No. 3, p. 156, and Vol. II, p. 155.

Instructions as to present worth of damages, see supra XIX, E, 6, (a).

For Benefit of Widow.

An instruction in an action under the Federal Employers' Liability Act for the benefit of a widow, that she was entitled to recover such damages as would fairly and reasonably compensate her for the loss of the pecuniary benefits she might reasonably have received but for her husband's death was correct and did not imply that the verdict should be for the aggregate of the several benefits payable at different times, without making any allowance for the fact that the whole sum of the verdict would be presently payable at one time. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

For Death of Minor.

An instruction to the effect that in determining the amount of damages in an action based on the Federal Employers' Liability Act for the death of a sixteen-year-old boy, the jury should take into consideration his age, length of service, acquaintance with the danger, etc., and then measure the damages by such reduction as they should think proper under all the circumstances, was erroneous. Davis v. Southern R. Co., — N. C. —, 96 S. E. 41.

For Conscious Pain and Suffering.

It is reversible error to instruct the jury in an action under the Federal Employers' Liability Act to allow damages for the pain and suffering of a servant, where the evidence shows that he did not regain consciousness after a fatal injury. New Orleans & Northeastern R. Co. v. Harris, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 535, reversing — Miss. —, 71 So. 913.

7. Defective Instrumentalities.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 300, and No. 3, p. 156.

Defective Boiler.

An instruction in an action under the Federal Employers' Liability Act for the death of an engineer as the result of the explosion of a locomotive boiler, to the effect that the law makes it unlawful for a carrier to use a locomotive engine unless its boiler and appurtenances are in proper condition and safe to operate without unnecessary peril to life; that no employee assumes the risk of injury by reason of any locomotive operated in violation of such law; and that the decedent did not assume the risk of injury arising from the negligence of the defendant in providing an oil-burning locomotive equipped with an improper type of crownsheet bolts having large button heads, in failing to provide fusible safety plugs, and in permitting an accumulation of scale on the crownsheet; but that if the decedent had actual knowledge of such defects, or if they were so plainly obvious that in the reasonable exercise of his facilities he should have known of them and may be presumed to have known of them, he assumed the risk of injury and cannot recover, held to correctly state the law, although more favorable to the defendant than he was entitled to. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

Hand Car.

Where it is the duty of a section foreman to renew from time to time the brake-shoe linings of a hand car, in an action under the Federal Employers' Liability Act for injuries sustained in a collision between two hand cars, an instruction that there was no evidence of the negligence of the operator of the colliding car, and if the jury found the brakes were not reasonably safe, that the defendant might be found guilty of negligence, is erroneous, since the defendant would not be liable unless the operator of the hand car was negligent. Miller v. Ann Arbor R. Co., 196 Mich. 297, 162 N. W. 1025.

10. Lookout and Warning of Danger.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 303.

Failure to Sound Whistle.

It is reversible error to instruct the jury in an action under the Federal Employers'

Liability Act, that it was negligence per se for an engineer to fail to sound the whistle at a highway crossing, if such failure resulted in the injury of a sectionman. Baird v. Northern Pac. R. Co., — Wash. —, 170 Pac. 1016.

11. Employment in Interstate Commerce.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 304, and No. 4, p. 53.

In General.

An instruction for the plaintiff was not erroneous in an action based on the Federal Employers' Liability Act for injuries received by the cook in the camp car of a bridge gang engaged in repairing a bridge over which both interstate and intrastate traffic was carried, by reason of the omission of the fact that for two or three weeks prior to the accident the car had been standing on a side track. Philadelphia, Baltimore & Washington R. Co. v. Smith, — Md. —, 103 Atl. 945.

Arrival at Place of Work Ahead of Time.

In an action under the Federal Employers' Liability Act for the killing of an employee a few minutes before his daily work in interstate commerce was to begin, it was proper to refuse an instruction to the effect that in determining whether the decedent was at the time of the accident doing some work for the defendant in furtherance and in aid of its interstate business, it is not sufficient that the former during working hours generally performed work of that nature, but it must appear that at the time of such accident he was engaged in some work which was assisting the defendant in its interstate business. Stool v. Southern Pac. Co. — Oreg. —, 172 Pac. 101.

In an action under the Federal Employers' Liability Act for the death of a section man who, a few minutes before his day's work was to begin, was struck and killed by a train, it was not error to add the words "unnecessarily and unreasonably" to an instruction to the effect that the decedent was not engaged in a work furthering the interstate business of the defendant if, at the time of the accident, he "was not doing any work for the defendant, but was walking along the defendant's track for the purpose of performing some errand personal to himself, or for the purpose of unnecessarily and unreasonably idling away the time until his working hours commenced." Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

There was no error in an action based on the Federal Employers' Liability Act, in modifying an instruction requested by the defendant to the effect that in order to recover the plaintiff must prove that her intestate was engaged in interstate commerce at the time he was killed, by adding thereto that it was not necessary that the decedent should have been engaged in actual work at the instant he was killed if his general employment was in such commerce, and he came upon the defendant's premises at a customary and proper time to report for work a few minutes before it was to begin. Stool v. Southern Pac. Co., — Oreg. —, 172 Pac. 101.

15. Negligence in General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 306, No. 3, p. 157, No. 4, pp. 52-53, and Vol. II, p. 150.

Running Train Against Current of Traffic.

The instructions given in an action under the Federal Employers' Liability Act for the death of a section hand who was struck by a train running against the current of traffic without appropriate warnings being given or a proper lookout kept, held correct. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163.

Duty to Keep Lookout.

Where a messenger boy was killed by a backing engine as he was standing between parallel tracks delivering a message to the conductor of a passing train, an instruction was erroneously given in an action under the Federal Employers' Liability Act that it was the duty of the engineer to keep a lookout, and that his failure to do so was negligence, when the evidence showed that the decedent was looking in the direction from which the train came, and that he was in a place of safety, and the instruction also omitted proximate cause as a necessary element. Davis v. Southern R. Co., — N. C. —, 96 S. E. 41.

Safe Place.

An instruction in an action under the Federal Employers' Liability Act for the death of a switchman, who was caught between the outer edge of a curved platform and the side of an extraordinary long car on a curved track, the rails of which were equidistant 15 inches from the edge of the platform, that the proximity of the track to the platform was an engineering question for the defendant to determine, and that negligence was not to be imputed to the defendant by reason of such proximity, held not erroneous. Northern Trust Co. v. Grand Trunk Western R. Co., 207 Ill. App. 11.

19. Rules.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 308, and No. 3, p. 157.

Habitual Violation.

An instruction was properly given in an action under the Federal Employers' Lia-

bility Act for the death of a car inspector who was killed by the sudden movement of a train when he went between cars at night, in the discharge of his duties, without displaying a blue light, to the effect that if those in charge of the train knew that the "blue light" rule had not been enforced for months, and that workmen were in the habit of disregarding it, that it was their duty, before moving the train, to see that no one was in a place of danger. Dutton v. Atlantic C. L. R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion 245 U. S. 673, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

Violation by Injured Employee.

Where an engineer was killed in a collision while running his train in violation of the rules of the carrier on the time of a belated train, the jury should be instructed in an action under the Federal Employers' Liability Act, to the effect that there could not be a recovery although he acted on the orders of his conductor whom he was bound to obey. Missouri, Kansas & Texas R. Co. v. Lenahan, — Okla. —, 171 Pac. 455, S. C. 39 Okla. 283, 135 Pac. 383.

F. Nonsuit.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 312-313, and Vol. II, p. 160.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 312, and Vol. II, p. 160.
Directing verdict for assumed risk, see infra XIX, G, 6.

For Assumed Risk.

A nonsuit was properly granted in an action under the Federal Employers' Liability Act for the death of an employee as the result of attempting to board moving cars, where he had ample opportunity to do so before the cars were set in motion. York v. Southern Pac. Co. — Oreg. —, 170 Pac. 927, rehearing denied 171 Pac. 567.

A nonsuit should be directed in an action under the Federal Employers' Liability Act for injuries sustained by a section hand from the head flying from a spike when struck by a coemployee, since the risk of such an injury is one ordinarily incident to such employment and which the plaintiff assumed. Ruping v. Oregon Short Line R. Co., — Utah, —, 171 Pac. 145.

A nonsuit may be entered in an action based on the Federal Employers' Liability Act when the plaintiff's evidence clearly makes the defense of assumed risk. Gaddy v. North Carolina R. Co., — N. C. —, 95 S. E. 925.

It is error to direct a verdict for the plaintiff in an action under the Federal Employers' Liability Act, by an instruction which ignores assumed risk. Bradley v. Vandalia R. Co., 207 Ill. App. 592.

Liability Under Federal Law Shown in Action on State Law.

When the statement of claim does not set out a case under the Federal Employers' Liability Act but relies on a state law, a nonsuit is properly entered where the proof shows employment in interstate commerce. Kleinguenther v. Philadelphia & Reading R. Co., 25 Pa. Dist. Rep. 425.

6. Waiver of Motion.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 313.

By Introduction of Testimony.

When the motion of the defendant to dismiss the plaintiff's complaint at the close of his evidence, is denied in an action under the Federal Employers' Liability Act, by introducing testimony the defendant waives the right to complain of such denial. Erie R. Co. v. Linnekogel, — C. C. A. —, 248 Fed. 389.

G. Directing Verdict.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 313-318, No. 3, pp. 157-158, No. 4, p. 54, and Vol. II, p. 160.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 313, No. 3, p. 157, and Vol. II, p. 160.

When Any Competent Testimony.

A verdict will not be directed for the defendant in an action under the Federal Employers' Liability Act, where the scintilla of evidence doctrine is the law of the forum. Dutton v. Atlantic C. L. R. Co., 104 S. C. 16, 88 S. E. 263, affirmed without opinion 245 U. S. 673, 62 L. ed. —, 38 Sup. Ct. Rep. 191.

Employment by Independent Contractor.

A verdict cannot be directed for the defendant railway in an action under the Federal Employers' Liability Act for injuries sustained by a servant while working on a coal dock at which interstate engines were coaled, where the evidence fails to show that he was employed by an independent contractor rather than the defendant railway. Guy v. Cincinnati Northern R. Co., — Mich. —, 166 N. W. 667, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 336.

Failure to Overcome Statutory Presumption of Negligence.

A peremptory instruction for the plaintiff cannot be given in an action based on

the Federal Employers' Liability Act for the failure of the defendant to meet any presumption of negligence created by a state statute. Yazoo & Mississippi Valley R. Co. v. McCaskell, — Miss. —, 79 So. 817.

3. When Negligence Shown or Inferrable.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 314, and Vol. II, p. 161.

Negligence of Fellow Servant.

Where an employee's own negligence contributes to his injury a peremptory instruction cannot be given for the defendant in an action under the Federal Employers' Liability Act, when the negligence of another employee also was a proximate cause of the accident. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329, S. C. 153 Ky. 247, 154 S. W. 941, 155 Ky. 153, 159 S. W. 695, 169 Ky. 102, 183 S. W. 264, writ of error dismissed 245 U. S. 681, 62 L. ed. —, 38 Sup. Ct. Rep. 345.

6. For Assumed Risk.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 317, No. 3, p. 158, and Vol. II, p. 162.

Granting nonsuit for assumed risk, see supra XIX, F.

In General.

A verdict should be directed for the defendant in an action based on the Federal Employers' Liability Act, where it clearly appears that an employee assumed the risk that caused his injury. Washington S. R. Co. v. Smith, 45 App. D. C. 192, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

A verdict cannot be directed for the defendant, in an action under the Federal Employers' Liability Act for injuries sustained by an employee on a work train as it was moving rapidly to a siding to escape an approaching passenger train, on the ground that he assumed the risk of injury from rails falling from a car, on which he was seated, in consequence of the failure of the defendant to place in the sockets in the side of the car standards 6 or 7 inches high, as was usually done, to prevent the falling of the rails, since their absence was not so plainly observable that he must be conclusively presumed to have known it. Hargrove v. Gulf, Colorado & Santa Fe R. Co., — Tex. Civ. App. —, 202 S. W. 188.

H. Argument to Jury.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 318, and No. 3, p. 158.

(No new decisions.)

I. Verdict.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 318-321, and Vol. II, p. 162.

Apportionment of Damages.

The jury is not required by the Federal Employers' Liability Act to apportion among the several beneficiaries the award made for the death of a servant. Jones v. Kansas City Southern R. Co., — La. —, 78 So. 568, S. C. 137 La. 178, 68 So. 401, and 241 U. S. 181, 60 L. ed. 36 Sup. Ct. Rep. 513.

It is proper for the jury, in an action governed by the Federal Employers' Liability Act, to apportion the damages for wrongful death between the widow and surviving children of a deceased servant. Horton v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883.

2. Majority Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 319, and Vol. II, p. 162.

Effect of state laws pertaining to majority verdicts, see supra XVI, D, 3, (o).

In General.

Three-fourths of the members of a jury may return a verdict in an action in a state court under the Federal Employers' Liability Act, when permitted by the state law. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148; Chicago, Rock Island & Pac. R. Co. v. Ward, — Okla. —, 173 Pac. 212.

J. Interest.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 321.

(No new decisions.)

K. Costs.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 322.

(No new decisions.)

L. Judgment.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 322.

Judgment Non Obstante Veredicto.

A state court may enter a judgment notwithstanding the verdict in an action based

on the Federal Employers' Liability Act. Marshall v. Chicago, Rock Island & Pac. R. Co., 133 Minn. 460, 157 N. W. 638, S. C. 131 Minn. 392, 155 N. W. 208, writ of error dismissed 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

M. New Trial.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 322-323, No. 3, p. 158, and Vol. II, p. 162.

6. Newly Discovered Evidence.

See also same section Federal Ry. Digest, Vol. II, p. 163.

In General.

The granting of a new trial in an action under the Federal Employers' Liability Act for newly discovered evidence, is a matter largely within the judicial discretion of the trial court. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

As the granting of a new trial in an action under the Federal Employers' Liability Act for newly discovered evidence, is a matter largely within the judicial discretion of the trial court, his ruling will not be disturbed on appeal unless his discretion has been abused. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

Medical Testimony.

The refusal to grant a new trial on the ground of newly discovered evidence, is not an abuse of discretion in an action under the Federal Employers' Liability Act, when such evidence consists of medical testimony bearing only on the extent of the plaintiff's injury, unless of such a convincing character that the verdict would have been clearly excessive had such evidence been given at the trial. Missouri, Kansas & Texas R. Co. v. Taylor, — Okla. —, 170 Pac. 1148.

XX. APPEAL AND ERROR.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 323-341, No. 3, pp. 158-169, No. 4, p. 54, and Vol. II, pp. 163-166.

A. To Federal Supreme Court.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 323-330; No. 3, p. 158, No. 4, p. 54, and Vol. II, p. 163.

(No new decisions.)

4. What Reviewable.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 326-329, No. 3, p. 158, and No. 4, p. 54.

(c) Pleading and Practice.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 327.

Local Rules of Practice.

The question whether a rule of practice of a state court requiring that if an instruction upon any issue is incorrect in form or substance the court must prepare or require the preparation of a correct one, applies to an action based on the Federal Employers' Liability Act, will not be determined by the Supreme Court of the United States, since a question of state law with which such court is not concerned. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

(e) Weight of Testimony.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 328.

In General.

Whether the record shows evidence sufficient to support a verdict is as far as the Supreme Court of the United States will go in determining questions of fact on error to a state court in an action under the Federal Employers' Liability Act, and the court will not review conflicting evidence. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

(f) Amount of Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 329.

In General.

The reasonableness of the amount awarded in an action in a state court under the Federal Employers' Liability Act, is not reviewable by the Supreme Court of the United States. Louisville & Nashville R. Co. v. Holloway, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 379, affirming 168 Ky. 262, 181 S. W. 1126.

B. To Federal Circuit Court of Appeals.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 330, and Vol. II, p. 164.

(No new decisions.)

C. Practice in General.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 331-335, No. 3, p. 159, and Vol. II, p. 164.

Appeal Forma Pauperis.

Under the Virginia statute the plaintiff cannot prosecute an appeal forma pauperis in an action under the Federal Employers' Liability Act. Going v. Norfolk & Western R. Co., 119 Va. 543, 89 S. E. 914, affirmed 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 22.

3. Questions Not Raised Below.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 333, No. 2, p. 159, and Vol. II, p. 164.

In General.

An appellate court will not determine whether it was error to submit to the jury the question whether a railway employee was engaged in interstate commerce, where at no time did the defendant request the trial court to hold as a matter of law that the Federal Employers' Liability Act controlled. Ettison v. Southern R. Co., — S. C. —, 96 S. E. 680.

The failure of a declaration to allege pecuniary loss in an action under the Federal Employers' Liability Act for the benefit of the surviving parents of a railway employee, will not be considered on appeal, when not questioned in the trial court. Roberts v. Southern R. Co., — Tenn. —, 206 S. W. 457.

4. Estoppel to Raise Questions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 335.

Rulings Obtained by Appellant.

An appellate court will not review a finding that an employee was within the Federal Employers' Liability Act, where such ruling was obtained at the instance of the appellant. Lanis v. Illinois C. R. Co., 140 La. 1, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. 544, 37 Sup. Ct. Rep. 241, affirmed without opinion 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 334.

5. Law of Case.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 335.

Law on second trial, see supra XVI, A.

In General.

When the judgment of a trial court is in accordance with the decision of an appellate court on a previous appeal, it is res adjudicata on a second appeal in an action under the Federal Employers' Liability Act. Lee v. Central of Georgia R. Co., — Ga. App. —, 95 S. E. 718, S. C. 21 Ga. App. 558, 94 S. E. 888, — Ga. —, 94 S. E. 558.

D. Reversible Error.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 335-340, No. 2, pp. 159-160, No. 4, p. 54, and Vol. II, p. 165.

1. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 335, No. 3, p. 159, No. 4, p. 54, and Vol. II, p. 165.

Submission of Questions to Jury.

The submission to the jury of the question whether a general rule of a carrier limiting the speed of trains in passing a station, was intended for the protection of employees of the carrier, is not reversible error in an action under the Federal Employers' Liability Act for the death of a servant who was struck by a train running at a speed greater than that permitted by the rule. Topore v. Boston & Maine R. R., — N. H. —, 103 Atl. 72, S. C. 78 N. H. 311, 100 Atl. 153.

Invited Error.

The defendant cannot urge on appeal that the plaintiff, in an action under the Federal Employers' Liability Act, assumed the risk of injury from the negligence of the master, where the defendant pleaded and at the trial obtained an instruction to the effect that the plaintiff assumed all risks and dangers ordinarily incident to the conduct of the defendant's business in the usual and ordinary way. Hinton v. Chicago & Great Western R. Co., — Mo. App. —, 206 S. W. 396.

2. Admission and Rejection of Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 336, and No. 3, p. 159.

Violation of Speed Rule as Negligence.

When the plaintiff shows in an action under the Federal Employers' Liability Act, that it was the practice of the defendant to run trains through a station while other trains were receiving or discharging passengers, at a greater speed than that permitted by its rules, it was reversible error to admit such rule in evidence as bearing on the question of the negligence of the defendant, since the rule was solely for the protection of the traveling public and not for employees. Topore v. Boston & Maine R. R., — N. H. —, 103 Atl. 72, S. C. 78 N. H. 311, 100 Atl. 153.

3. Submission Under State or Federal Law.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 336, and Vol. II, p. 165.

When Favorable to Defendant.

The defendant was not prejudiced by the submission of a railway employee's action

under the Federal Employers' Liability Act when employment in interstate commerce was not shown, where no question of assumed risk was involved, and the Federal and state laws were the same with respect to contributory negligence. Eley v. Chicago Great Western R. Co., — Iowa, —, 166 N. W. 739.

Judicial Notice of Application of Federal Law.

When the petition in a railway employee's action for personal injuries, states a cause of action under a state law and his evidence shows that the Federal law controls, an appellate court must take notice of that fact. Spaw v. Kansas City Terminal R. Co., — Mo. App. —, 201 S. W. 927.

4. Instructions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 337, and No. 3, p. 160.

Correctness of instructions in general, see supra XIX, E.

Failure to Instruct as to Reduction of Damages for Contributory Negligence.

The failure to instruct as to reduction of damages for contributory negligence in an action founded on the Federal Employers' Liability Act, is immaterial when the record does not disclose evidence of any such negligence. Capitol Traction Co. v. McKeon, — Md. —, 103 Atl. 314.

5. Verdict and Findings.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 337, and Vol. II, p. 165.

Weight of Testimony and Credibility of Witnesses.

A finding for the plaintiff in an action under the Federal Employers' Liability Act for injuries sustained by stumbling over a jack block which was alleged to have been negligently left between the tracks in a railway yard, will not be disturbed on appeal, although the testimony of the defendant that there was no such obstruction predominates, and the reputation for truth and veracity of the plaintiff's witnesses was shown to be bad, since the credibility of the witnesses and the weight of their testimony was for the jury. Illinois Central R. Co. v. Skinner, 177 Ky. 62, 197 S. W. 552, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

E. Remittitur.

See same section Federal Ry. Digest, Vol. I, No. 2, p. 340.

(No new decisions.)

F. Affirmance, Reversal and Remand.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 340, and Vol. II, p. 165.

2. Affirmance.

When Evidence Conflicting.

A judgment for the plaintiff in a state court will not be disturbed by the Supreme Court of the United States in an action based on the Federal Employers' Liability Act for injuries sustained by an engineer from the explosion of a locomotive boiler, when the evidence is conflicting as to whether the accident was caused by using oil as fuel in a boiler having button head crown sheet bolts which exposed an excessive and unnecessary large surface to the direct heat, the failure to provide fusible plugs, or by an accumulation of scale on the crown sheet, or whether the explosion was due to the negligence of the plaintiff in permitting the water to become low, where two state courts have held the evidence sufficient to support the verdict. Great Northern R. Co. v. Donaldson, 246 U. S. 121, 62 L. ed. —, 38 Sup. Ct. Rep. 230, affirming 89 Wash. 161, 154 Pac. 133.

4. Remand for New Trial.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 341, and Vol. II, p. 165.

For New Trial on Single Question.

When the only question involved on appeal in an action based on the Federal Employers' Liability Act is whether an employee was engaged in interstate commerce at the time he sustained an injury, the appellate court may order a new trial on that question only, with directions to enter a judgment on the verdict if such employment is found to have existed. Chicago & Alton R. Co. v. Allen, — C. C. A. —, 249 Fed. 280.

Remand to Permit Pleading Common-Law Action.

Where a judgment of a state court for the plaintiff in an action based solely on the Federal Employers' Liability Act, was reversed by the Supreme Court of the United States because such act was not applicable, the state court will not remand so as to permit the plaintiff to amend by setting up a common-law cause of action which was barred by the statute of limitations, since to permit the amendment would amount to the beginning of a new action. Baltimore & Ohio R. Co. v. Branson, — M. —, 104 Atl. 356.

GOVERNMENT OPERATION OF RAILWAYS*

See also same title, Vol. II, Federal Ry. Digest, p. 167.

Orders of Director General.

—Director General as Defendant in Actions Against Carriers.

GENERAL ORDER NO. 50.

Whereas by the Proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said Proclamations that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes * * * but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such"; and

Whereas the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President"; and

Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director-General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

W. G. McAdoo,
Director General of Railroads.

Washington, October 28, 1918.

—Amendment to General Order 50.

General Order No. 50, issued October 28, 1918, is hereby amended to read as follows:

It Is Therefore Ordered, That actions at law, suits in equity, and proceedings in

*For text of Act of Congress pertaining to government operation of railways, see appendix, Vol. II, Federal Ry Digest, pp. 190-195.

admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A, and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

WALKER D. HINES,
Director General of Railroads.

Washington, January 11, 1919.

— Attachment and Garnishment Suits.

GENERAL ORDER NO. 43.

Washington, Sept. 5, 1918.

Whereas, Proceedings in garnishment, attachment, or like process by which it is sought to subject or attach money or property under Federal control or derived from the operation of carriers under Federal control under the act of Congress of March 21, 1918, are inconsistent with said act, and with the economical and efficient administration of Federal control thereunder; and

Whereas, Such proceedings are frequently commenced, particularly for the garnishment or attachment of amounts payable, or claimed to be payable, as wages or salaries of employees, which practice is prejudicial to the interests of the Railroad Administration in the operation of the lines and systems of transportation under Federal control, and is not necessary for the protection of the rights or the just interests of employees or others; and

Whereas, If any rules or regulations become necessary to require employees to provide for their just debts, the same will be issued hereafter;

It Is Therefore Ordered, That no moneys or other property under Federal control or derived from the operation of carriers while under Federal control shall be subject to garnishment, attachment, or like process in the hands of such carriers or any of them, or in the hands of any employee or officer of the United States Railroad Administration.

W. G. McADOO,
Director General of Railroads.

— Settlement of Damage Claims.

I beg to call your attention to the following letter from the Honorable John Barton Payne, General Counsel, Division of Law, United States Railroad Administration, to the Presidents of Eastern Railroads, outlining a general policy with respect to the handling of personal injury claims against railroad companies under Federal control:

The Federal Control Act contemplates that suits for personal injuries may be brought as heretofore, but provides that execution may not be levied on the property of the carrier while in the possession of the government. This means that while a judgment may be recovered, it devolves upon the Director General to provide for payment, and this places upon him the responsibility of considering the merits of the claims and the persons to whom payment is made. It is the desire of the Director General that justice shall be done to all employees who are injured in the discharge of their duties. This does not mean that verdicts based upon prejudice or passion shall be paid, or that large sums shall be paid by the Government to attorneys and solicitors who have no claim upon the Government. The right is reserved to consider the merits in determining what provision shall be made.

It will be the policy of the Government to discourage litigation, and to deal di-

rectly with injured persons to the end that the injured person may receive the benefit of any amount which the Government pays, without the expense of litigation, and without being compelled to turn over one-third or one-half to an attorney. You may, therefore, let it be known that such claims will be considered on the merits.

As to fee contracts: You are authorized to exercise a wise discretion and are not required to make payment as provided therein, but only on such terms as will enable the person injured to receive just treatment. If the contract is unjust, you may pay the attorney such reasonable sum as will pay him for the services actually rendered.

These suggestions should be of considerable help to you in disposing of such questions as may arise in connection with personal injury claims; and I shall be glad if you will see the observance of same is protected from your respective lines.

— Venue of Actions Against Carriers.

GENERAL ORDER NO. 18.

Washington, D. C., April 9, 1918.

Whereas, The Act of Congress approved March 21, 1918, entitled "An Act to Provide for the Operation of Transportation Systems While Under Federal Control," provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control"; and

Whereas, It appears that suits against the carriers for personal injuries, freight and damage claims are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the Government, and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs;

It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

GENERAL ORDER NO. 18A.

Washington, D. C., April 18, 1918.

General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

— Stricter Ruling as to Suits.

GENERAL ORDER No. 26

Washington, D. C., May 23, 1918.

Whereas the Act of Congress approved March 21, 1918, entitled An Act to Provide for the Operation of Transportation Systems While Under Federal Control, provides (Section 10) "That carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control"; and authorizes the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

Whereas by a proclamation dated March 29, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

Whereas it appears that there are now pending against carriers under Federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in states and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose;

the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of railroads; and the practice of trying such cases during Federal control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs;

It is therefore ordered, that upon a showing by the defendant carrier that the just interests of the Government would be prejudiced by a present trial of any suit against any carrier under Federal control which suit is not covered by General Order No. 18, and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of Federal control; Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the Statute of Limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order No. 18-A.

Actions Against Railways Under Federal Control.

— In General.

The bringing of actions and the obtaining of judgments against carriers while under Federal control is not precluded by the Act of Congress and the proclamation of the President of the United States assuming control of the railways of the country as a war measure, notwithstanding that the enforcement of judgments or decrees by the levy of process against the property of such carrier is forbidden. Louisville & Nashville R. Co. v. Steel, — Ky. —, 202 S. W. 878.

—Venue of Actions Against Carriers Under Federal Control.

Sections 9 and 10 of the Act of Congress taking over control of the railways of the country as a war measure (see Vol. II, Federal Ry. Digest, p. 193), authorized orders 18 and 18A made by the Director General of Railroads April 8th and 18th, 1918 (see Federal Ry. Digest Vol. III, p. 131), requiring actions against carriers under Federal control to be brought in the district or county wherein the cause of action accrued, or in which the injured person resided at that time. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

Under orders 18 and 18A made by the Director General of Railroads, April 9th and 18th, 1918 (see Federal Ry. Digest Vol. III, p. 131), it is necessary that an action under the Federal Employers' Liability Act be brought in the district or county wherein the cause of action accrued, or in which the injured servant resided at that time. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

The Act of Congress of March 21, 1918, relative to the control of railroads by the Government, justifies orders 18, 18A and 26 of the Director General of Railroads relative to the venue of suits against carriers while under government control, and requiring them to be brought in the county or district wherein the plaintiff resided at the time his cause of action arose, or in which it accrued. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

Orders 18, 18A, and 26 of the Director General of Railroads relating to the venue of actions against railways while under Government control, are not subject to the objection that they are ex post facto, or retroactive in their effect. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

—Effect of Bringing Action in Wrong Jurisdiction.

When an action against a railway under Government control, is brought in a district or county other than that in which the cause of action accrued, or the injured person resided at that time, a plea in abatement will lie. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

Under Orders 18, 18A and 26 of the Director General of Railroads, a court may stay proceedings until the close of the war in an action against a railway under Government control, when brought in a county other than that in which the plaintiff resided at the time the cause of action arose, or in which it accrued. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

The court will, under General Orders 18 and 18A of the Director General of Railroads, dismiss an action for personal injuries when brought against a carrier in a state other than that wherein the plaintiff resides at the time his cause of action accrues, or in which it accrues. Cocker v. New York, Ontario & Western R. Co., 253 Fed. 676.

A writ of mandamus will not be granted to compel an immediate trial of an action against a railway while under Government control, in which the trial court stayed all proceedings until the close of the war because the action, contrary to Orders 18, 18A and 26 of the Director General of Railroads, was brought in a county or district other than that in which the plaintiff resided when the cause of action arose, or in which it accrued, especially where the plaintiff has not applied to the Director General for relief in the manner pointed out in Order 26. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

Under Order No. 26 of the Director General of Railroads, an action for injuries to a child, when brought in a state other than that wherein the plaintiff resided at the time his cause of action accrued, or wherein it accrued, when the child's health is good, and there are no dependents, will be stayed until the termination of government control, where to permit a present trial in the jurisdiction wherein the action is pending will require the taking away from duty a train crew engaged in moving war materials by a carrier already shorthanded by reason of many employees leaving to engage in war services. Cocker v. New York, Ontario & Western R. Co., 253 Fed. 676.

Under General Order 26 of the Director General of Railroads, a court will, in determining whether the prosecution of an action against a carrier shall be stayed during the continuance of Federal control, when brought in a state other than that wherein the plaintiff resided at the time his cause of action accrued, or wherein it accrued, be governed by the consideration whether the just interests of the Government will be prejudiced by a present trial in the jurisdiction wherein the action is pending. Cocker v. New York, Ontario & Western R. Co., 253 Fed. 676.

— Actions for Penalties.

ORDER No. 8

Washington, February 21, 1918.

To correct wrong impressions that may exist regarding the employment and conditions of labor in railway service, it is, until further order directed that:

1. All Acts of Congress to promote the safety of employees and travelers upon the railroads, including Acts requiring investigation of accidents on railroads, and Orders of the Interstate Commerce Commission made in accordance therewith, must be fully complied with. These Acts and Orders refer to Hours of Service, Safety Appliances and Inspection.

Now that the railroads are in the possession and control of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for willful and inexcusable, violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case.

2. When the exigencies of the service require it, or when a sufficient number of employees in any department are not available to render the public prompt transportation service, employees will be required to work a reasonable amount of overtime. So far as efficient and economic operation will permit, excessive hours of employment will not be required of employees.

Power of Congress to Control Railways.

Congress has the power to take possession and control of the railways of the country as a necessay war measure. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

Validity of Appointment of Director General.

The Act of Congress of March 21, 1918, relative to the control by the Government of the railway of the country as a war measure affirms the appointment by the President of a Director General of Railroads. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

Validity of Orders of Director General.

Under section 10 of the Act of Congress of March 21, 1918, relative to the Governmental control of railways, orders made by the Director General of Railroads must be considered as those of the President of the United States. Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114.

Judicial Notice of Government Control.

The court will take judicial notice of the fact that a state of war exists and that the government of the United States has assumed control of the operation of the railway systems of the country. Marshall v. Bush, — Neb. —, 167 N. W. 59.

Orders of State Commissions.

— Suspension During War.

Where, before the United States assumed control of the railway systems of the country, a state Railroad Commission

made an order requiring a railway to provide separate passenger and freight train service at an additional expense, the order should remain in abeyance until the Commission is given an opportunity to determine how far it may impinge upon the powers given by Congress to the Director General of Railways over the operation of carriers during the war, and also whether under the present conditions, the order should not be vacated. Marshall v. Bush, — Neb. —, 167 N. W. 59.

An order of a state railroad commission requiring an interstate railway company to remove a depot and to replace it with a modern fireproof structure, will, after submission of an appeal to the state supreme court and the passing of the railway under government control, be suspended until the further order of the court, on the ground that in time of war all the resources of the carrier should be conserved. St. Louis & San Francisco R. Co. v. State, — Okla. —, 170 Pac. 1146.

Added Damages Under State Law.

An award of 10 per cent additional damages, as permitted by a state law, to the amount of a superseded judgment in an action founded on the Federal Employers' Liability Act, is not precluded by the fact that the defendant railway is under government control. Louisville & Nashville R. Co. v. Steel, — Ky. —, 202 S. W. 878.

Establishment of Stations.

The Federal government being in control of the railroads of the country as a war measure, state courts and administrative tribunals should consider the general welfare in adjusting between private suitors controversies involving the expenditure of railroad funds for the improvement of local transportation facilities by establishing a station near a point where there are adequate station facilities. Ralston Business Men's Ass'n. v. Bush, — Neb. —, 167 N. W. 727.

Furnishing Shipping Facilities.

A common carrier will not be excused from its duty of furnishing switch tracks to a shipper, on the ground that all of the energies of the carrier are required to meet Government needs brought about by the war, where it does not appear that the granting of such facilities would divert any of the carrier's energies, or require of it services which would make it less able to perform its public duties. Norfolk & Western R. Co. v. Public Service Commission, — W. Va. —, 96 S. E. 62.

HOURS OF LABOR ACT*

FEDERAL

Prosecutions for violating act during Federal Control, see supra, title, Government Operation of Railways.

I. VALIDITY AND CONSTRUCTION.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 342, No. 3, p. 161, No. 4, pp. 55-56, and Vol. II, p. 169.

A. Validity.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 342, No. 3, p. 161, and No. 4, p. 55.

(No new decisions.)

B. Construction.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 342, No. 4, p. 55, and Vol. II, p. 169.

In General.

The purpose of the Hours of Labor Act is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task, and the law should be construed and applied in view of that purpose and the well-known circumstances attending the practical operation of trains. Chicago & Alton R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 442, affirming 157 C. C. A. 290, 244 Fed. 945.

C. Effect on State Laws.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 342, and No. 4, p. 56.

(No new decisions.)

II. WHAT CARRIERS WITHIN ACT.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 56, Vol. II, p. 169.

A. In General.

(No new decisions.)

B. Receivers.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 56.

(No new decisions.)

C. Terminal Companies.

See also same section, Vol. II, Federal Ry. Digest, p. 169.

(No new decisions.)

III. WHAT EMPLOYEES WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 343, No. 4, pp. 56-59, and Vol. II, p. 169.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 343, No. 4, p. 56.

(No new decisions.)

*For text of Act see No. 2, Vol. I, Federal Ry. Digest, p. 396.

B. Employees of Interstate Carriers.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 343.

(No new decisions.)

C. Employees of Intrastate Carriers.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 343.

(No new decisions.)

D. Telegraph and Telephone Operators.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 57-58, and Vol. II, p. 169.

Operators at Day and Night Offices.

Where one telegraph operator was kept on duty daily at a station for more than twelve hours, and at night another operator remained on duty for a similar period in a box car a short distance from the station in the railway yard, the Hours of Labor Act was violated, since the two places constituted but one office which was open continuously night and day. Grand Rapids & Indiana R. Co. v. United States, — C. C. A. —, 249 Fed. 646, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

Where one telegraph operator was kept on duty daily at a station for more than twelve hours, and at night another operator remained on duty for a similar period in a box car a short distance from the station in the railway yard, the Hours of Labor Act was violated, since the two places constituted but one office which was open continuously night and day. Grand Rapids & Indiana R. Co. v. United States, — C. C. A. —, 249 Fed. 646.

A telegraph office is not open continuously day and night when the operator is on duty from 7 a. m. until 6 p. m. with an hour off at noon, although he is also required to serve from thirty to forty minutes at 12:35 a. m. and a similar period at 4:20 a. m. to meet passing trains. United States v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., — C. C. A. —, 250 Fed. 382.

E. Towermen and Switch Tenders.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 59, and Vol. II, p. 170.

In General.

Requiring switchtenders to remain on duty for more than nine hours in twenty-four violates the Hours of Labor Act, where the switch shanties were open continuously night and day for controlling the movements of interstate trains through a railway yard in accordance with orders which the switchtenders received by telephone from the yardmaster's office. Chicago & Alton R. Co. v. United States, 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 442, affirming 157 C. C. A. 290, 244 Fed. 945.

F. Trainmen Receiving Orders by Telephone.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 59.

(No new decisions.)

G. Deadheading Employees.

See also section C, Federal Ry. Digest, Vol. I, No. 2, p. 343.

(No new decisions.)

IV. COMPUTING PERIOD OF EMPLOYMENT.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 59-61, and Vol. II, p. 170.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 59.

(No new decisions.)

B. When Duties Begin.

See also Federal Ry. Digest, Vol. I, No. 2, p. 342, and No. 4, p. 60, and Vol. II, p. 170.

(No new decisions.)

C. Temporary Release From Duty.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 60, and Vol. II, p. 170.

In General.

It cannot be said as a matter of law that the Hours of Labor Act was violated where the crews of "pusher" engines which helped trains over a mountain, were, at the end of their runs, relieved from duty for periods of an hour or more until the arrival of a train from the opposite direction which was to be pushed, the engines being left in the care of hostlers during such periods, the crews being under pay, and required to remain at nearby boarding or rest houses provided by the company, or some other places where they could be reached by the hostlers when needed for duty. Pennsylvania R. Co. v. United States, — C. C. A. —, 246 Fed. 881.

In General.

A telegraph operator who lived in a station and worked from 7 a. m. until 6 p. m.

daily, with an hour off at noon, has a reasonable opportunity for rest, although required to meet two trains at night, where there was a period of three hours and two and a half hours respectively between trains. United States v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., — C. C. A. —, 250 Fed. 382.

An hour allowed a telegraph operator for meals cannot be deducted from the time he was required to work, so as to prevent a violation of the Hours of Labor Act, where at all times during the hour he was required to hold himself in readiness for recall at any moment, although on the day in question he was not recalled before the expiration of the hour. Chicago, Rock Island & Pacific R. Co. v. United States, — C. C. A, —, 253 Fed. 555.

V. VIOLATION OF ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 61-70.

Prosecutions for violating act during Federal control, see title Government Operation of Railways.

A. What Constitutes.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 61, and Vol. II, p. 170.

Operator Working Temporarily for Another Company.

Where at a point of intersection with the line of another company a telegraph operator was employed and paid by the defendant company, but was subject part of the time to the orders of the latter company, which paid the defendant company for the operator's services, the defendant is liable for a violation of the Hours of Labor Act due to the operator being kept on duty overtime by the other company. United States v. Denver & Rio Grande R Co., — C. C. A. —, 249 Fed. 464.

B. Knowledge or Consent of Carrier to Overtime Work.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 63, and Vol. II, p. 171.

(No new decisions.)

C. Taking Delayed Train to End of Run.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 63, and Vol. II, p. 171.

In General.

Notwithstanding that a landslide which caused the detouring of a train over the lines of other roads is within the proviso of section 3 of the Hours of Service Act permitting the keeping of employees on duty for more than 16 hours, it does not permit them to be kept on duty until the end of their run when they might have been relieved at intermediate division points, although an order of the Interstate Commerce Commission permitted delayed employees to continue to the terminal or end of their run. San Pedro, L. A. & S. L. R. Co. v. United States, 136 C. C. A. 343, 220 Fed. 737, certiorari denied 247 U. S. 307, 62 L. ed. —, 38 Sup. Ct. Rep. 498.

D. Exceptions and Excuses.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 64-68, and Vol. II, p. 172.

In General.

In order for a carrier to justify the excess of service beyond the period prescribed by the Hours of Labor Act, it must show that such excess was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but that it was the direct result of an act of God, a casualty, unavoidable accident, or of a cause not known to or which could not have been foreseen by the carrier or its officers in charge of such employees, at the time they left a terminal. San Pedro, L. A. & S. L. R. Co. v. United States, 136 C. C. A. 343, 220 Fed. 737, certiorari denied 347 U. S. 307, 62 L. ed. —, 38 Sup. Ct. Rep. 498.

Care and Diligence to Prevent Violation.

Proof of the exercise of reasonable care and diligence by a carrier to make provisions against a violation of the Hours of Labor Act in operating a railway, is not admissible to show that the law has not been violated. Atchison, Topeka & Santa Fe R. Co. v. United States, — C. C. A. —, 251 Fed. 261.

Since a positive and absolute duty to obey the commands of the Hours of Labor Act rather than an obligation to exercise care and diligence, is imposed, a violation of the act cannot be excused by showing changes in methods, practices and property made in the exercise of reasonable care, prudence and foresight to meet the new conditions created by the act. Atchison, Topeka & Santa Fe. R. Co. v. United States, —C. C. A. —, 251 Fed. 261.

Unavoidable Accidents.

Evidence that an unavoidable accident caused delay for a period of time sufficient to equal in part the excess service of employees is not a defense to an action for a penalty under the Hours of Labor Act, where no attempt is made to explain the remainder of the excess time. Atchison,

Topeka & Santa Fe R. Co. v. United States, — C. C. A. —, 251 Fed. 261.

Wrecks.

When, on being notified of the sudden illness of an operator at a day and night office, a train dispatcher sent a relief operator as soon as possible, but on the way his train was wrecked and in order to expedite the clearing of the track he was directed to open a temporary telegraph office at the wreck, a casualty or emergency arose, within the meaning of the proviso of section 3 of the Hours of Labor Act, which will permit the keeping of the operators at the regular office on duty for 12 hours each for 3 successive days. San Pedro, L. A. & S. L. R. Co. v. United States, 136 C. C. A. 343, 220 Fed. 737, certiorari denied 247 U. S. 307, 62 L. ed. —, 38 Sup. Ct. Rep. 498.

War Conditions.

The fact that new and unusual conditions confront transportation by rail in a time of war can not be taken into consideration in determining whether there has been a violation of the Hours of Labor Act, where the evidence shows that the alleged violation occurred in 1914 before any derangement of transportation had occurred. Atchison, Topeka & Santa Fe R. Co. v. United States, — C. C. A. —, 251 Fed. 261.

VI. REPORTS OF VIOLATIONS.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 68-70.

(No new decisions.)

VII. ACTIONS FOR VIOLATIONS.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 343-344, No. 3, p. 161, No. 4, pp. 70-72, and Vol. II, p. 175.

Actions for violating act during Federal control, see title Government Operation of Railways.

A. Civil.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 343-344, No. 3, p. 160 and No. 4, pp. 70-73.

(No new decisions.)

B. Recovery of Penalties.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 70-72, and Vol. II, p. 175.

Actions for violating act during Federal control, see title, Government Operation of Railways.

Burden of Proof.

The burden is on the defendant to show that services in excess of that permitted by the Hours of Labor Act were the result of the causes which are claimed to have justified it, and that the defendant exercised the required diligence to prevent the excessive labor. Atchison, Topeka & Santa Fe R. Co. v. United States, — C. C. A. —, 251 Fed. 261.

VIII. APPEAL AND ERROR.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 344, No. 4, p. 72, and Vol. II, p. 176.

What Appealable.

A judgment of the Circuit Court of Appeals affirming the imposition of six separate penalties of $150 each on a carrier for violating the Hours of Labor Act, is not reviewable on writ of error by the Federal Supreme Court under section 241 of the Judicial Code of March 3, 1911, since less than $1,000, excluding costs, is involved. San Pedro, Los Angeles & S. L. R. Co. v. United States, — U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 498, S. C. below 136 C. C. A. 343, 220 Fed. 737.

SAFETY APPLIANCE ACT*

FEDERAL

Actions for violating act during Federal control, see title Government Operation of Railways.

I. VALIDITY.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 346-347, and No. 4, p. 73.

(No new decisions.)

II. NATURE AND CONSTRUCTION.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 347, No. 3, p. 162, and No. 4, p. 78.

A. Nature.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 347, and No. 4, p. 73.

(No new decisions.)

B. Construction.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 347, No. 4, p. 73, and Vol. II, p. 178.

In General.

The Safety Appliance Act must be broadly construed since its purpose is

*For text of Act, see No. 2, Vol. I, Federal Ry. Digest, p. 97.

remedial and humanitarian. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161.

C. Territorial Extent.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 347, and No. 4, p. 74.

(No new decisions.)

D. Effect on State Laws.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 347, No. 3, p. 162, and No. 4, p. 74.

(No new decisions.)

III. DUTY IMPOSED.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 348-351, No. 3, p. 162, No. 4, pp. 74-79, and Vol. II, pp. 178-180.

A. In General.

See also same section Federal Ry. Digest Vol. I, No. 2, p. 348, No. 4, p. 74, and Vol. II, p. 178.

Nature of Duty.

An absolute and unqualified duty is imposed by the Safety Appliance Act on all interstate railways to maintain the safety devices on cars in a secure condition. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161.

The obligation of a carrier to provide and maintain the equipment required by the Safety Appliance Act is absolute, even though the lack of it is occasioned in no degree by want of care or diligence on the part of the carrier, except where the case falls within the proviso of section four of the act. United States v. Chicago & Alton R. Co., — C. C. A. —, 250 Fed. 101.

Effect of Extension of Time for Equipping Cars.

The suspension order made by the Interstate Commerce Commission March 13, 1911, pursuant to the section three of the Safety Appliance Act, did not operate to extend the time for equipping each car with four grabirons on the sides, because the order expressly provides that the extension of time shall not be construed to relieve carrier from complying with the requirements of section four of the Act of March 2, 1893. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

B. Coupling Apparatus.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 348, No. 3, p. 162, No. 4, pp. 76-78, and Vol. II, p. 179.

In General.

The Safety Appliance Act is satisfied when cars are equipped with couplers with knuckles which can be opened from the sides of the cars with levers, and a railway company is not obliged to provide couplers with knuckles which will at all times remain open for coupling by impact. Chesapeake & Ohio R. Co. v. Charlton, — C. C. A. —, 247 Fed. 34.

Ignorance of Defects.

The moving of cars with defective safety devices, even though the carrier is ignorant thereof, is a violation of the Safety Appliance Act and the exercise of due care is no excuse. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

Broken Lock Chains.

The Safety Appliance Act is violated by the movement of a car having a coupler inoperative because the lock chain was disconnected from the uncoupling lever. United States v. Chicago & Alton R. Co., — C. C. A. —, 250 Fed. 101.

Failure of Federal Inspector to Give Notice of Defects.

The failure of Government inspectors to inform a railway company of the discovery of defective safety devices on a car does not relieve the latter from liability for a penalty under the Safety Appliance Act for the subsequent movement of the car while in such condition. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

Going Between Cars to Adjust Couplers.

The Safety Appliance Act is violated when a brakeman has to go between cars in order to open the knuckle of a coupler with his hands to prepare it for coupling automatically by impact. Texas & Pac. R. Co. v. Sprole, — Tex. Civ. App. —, 202 S. W. 985.

C. Grabirons, Handholds and Ladders.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 350, No. 4, p. 78, and Vol. II, p. 179.

What Grab Irons or Handholds Required.

The requirement of the Safety Appliance Act with respect to grabirons applies

to the rungs of the ladders on the side of cars as well as to grabirons on the roofs of cars. Kansas City, Mexico & Orient R. Co. v. Swift, — Tex. Civ. App. —, 204 S. W. 135.

The maintenance of one grabiron or handhold on each side of a car near one end is not a compliance with section four of the Federal Safety Appliance Act, as the necessity of having such grabiron or handhold upon each side of a car near each end is fairly contemplated by the language of the act. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

On November 8, 1915, the Safety Appliance Act did not require freight cars to be equipped with grab irons at all four corners, the law being satisfied with grab irons on each end of the car opposite the coupling lever. Boehmer v. Pennsylvania R. Co., — C. C. A. —, 252 Fed. 553.

Sill Steps.

The suspension clause of the order made by the Interstate Commerce Commission March 13, 1911, did not relieve carriers from complying with the positive provision of the same order requiring four sill steps on each car, "one near each end on each side of the car," but imposed an immediate duty to equip each car with that number of sill steps. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

The grant to carriers of an extension of time within which to comply with the requirements of the order of the Interstate Commerce Commission made March 13, 1911, was a valid suspension only for the purpose of deferring the standardization of sill steps and other appliances thereinmentioned with respect to their exact location, dimensions, and manner of application, and did not relieve carriers from the necessity of equipping each car immediately with four secure sill steps of a kind and character reasonably adequate and sufficient to answer the object and purposes contemplated by the Federal Safety Appliance Act. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

D. Power Brakes.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 351, No. 3, p. 162, No. 4, p. 78, and Vol. II, p. 179.

In General.

When the air brakes on 85 per cent of the cars of a train are coupled together and workable as required by the Safety Appliance Act and the rules of the Interstate Commerce Commission, it is immaterial whether the remainder of the train is made up of cars equipped with hand brakes or those having their air brakes cut out and inoperative because of defects. United States v. Chesapeake & Ohio R. Co., — C. C. A. —, 247 Fed. 49.

E. Hand Brakes.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 351, No. 4, p. 79, and Vol. II, p. 179.

Requiring Use of.

The fact that the Safety Appliance Act requires freight cars to be equipped with efficient hand brakes does not nullify the requirements of the Act with the respect to the use of power brakes on trains so as to permit a carrier to require freight trains while descending a designated grade to be controlled by the hand brakes to the exclusion of the power brakes. Grand Rapids & Indiana R. Co. v. United States, — C. C. A. —, 249 Fed. 650, affirming 244 Fed. 609, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

The Safety Appliance Act is violated where, pursuant to an order of a railway company, while freight trains were descending a designated grade, the speed was required to be controlled by the hand brakes to the exclusion of the power brakes. Grand Rapids & Indiana R. Co. v. United States, — C. C. A. —, 249 Fed. 650, affirming 244 Fed. 609, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

The fact that freight cars are equipped with air retainers which permit the air brakes to be operated by levers from the tops of the cars, does not justify an order that on a designated grade the speed of freight trains shall be controlled exclusively by the hand brakes, where the order also requires all trains to stop at the crest of the grade when the crews might operate the control levers while the trains were standing still. Grand Rapids & Indiana R. Co. v. United States, — C. C. A. —, 249 Fed. 650, affirming 244 Fed. 609, certiorari denied — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

F. Height of Drawbars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 351, and No. 4, p. 79.

(No new decisions.)

G. Running Boards.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 351.

(No new decisions.)

IV. WHAT CARRIERS WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 352, No. 4, p. 79-80, and Vol. II, p. 180.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 79.

Following Federal Decisions in Determining.

It is only the decisions of the Supreme Court of the United States which a state court is bound to follow in determining whether a railway company is a common carrier within the meaning of the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

Intrastate Road.

An intrastate railway which handles both interstate and intrastate traffic, is within the terms of the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill., 301, 120 N. E. 259.

Industrial Railway.

A railway company organized under the general laws of a state is a common carrier within the meaning of the Safety Appliance Act, although all of the tracks owned by it are within the boundaries of a private industrial plant, which is the only customer served, but for which both interstate and intrastate traffic is handled and moved to and from a belt railway outside the limits of the plant. Kenna v. Calumet, Hammond & S. E. R. Co., — Ill. —, 120 N. E. 259, affirming 206 Ill. App. 17.

B. Electric Railways.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 352, and No. 4, p. 80.

(No new decisions.)

C. Lessors and Lessees.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 352.

When within Federal Employers' Liability Act, see that title, V, D.

(No new decisions.)

V. WHAT EMPLOYEES WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 352, No. 4, p. 81.

Switchman Handling Intrastate Cars.

A switchman employed by an intrastate railway, which handles both interstate and intrastate traffic, may recover for injuries proximately caused by a violation of the Federal Safety Appliance Act, although at the time of the accident neither the carrier nor the servant were actually engaged in interstate commerce. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

VI. WHAT CARS AND VEHICLES WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 352, No. 3, p. 162, No. 4, p. 81, and Vol. II, p. 180.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 352, No. 3, p. 162, and No. 4, p. 81.

(No new decisions.)

B. Locomotives.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 354, and No. 4, p. 81.

(No new decisions.)

C. Cars in General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 81, and Vol. II, p. 180.

Cars Used in Intrastate Traffic.

The requirements of the Federal Safety Appliance Act, as amended, are mandatory, and embrace all cars used on any railroad that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not, and include employees injured through a failure to comply with its terms, even though engaged in duties unconnected with interstate commerce. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

Car on Siding for Unloading.

A car without a coupler is in use, within the meaning of the Safety Appliance Act, while standing on a siding for unloading, where, by reason of the defective condition of the car, a brakeman was killed when the car he was riding came into contact with the crippled car, although it was not intended to do so. Lang v. New York Cent. R. Co., 172 N. Y. Supp. 196.

D. Tenders.

See also section C, Federal Ry. Digest, Vol. I, No. 2, p. 354.

(No new decisions.)

E. Dining Cars.

See also section D, Federal Ry. Digest, Vol. I, No. 2, p. 354.

(No new decisions.)

F. Shovel Cars.

See also section E, Federal Ry. Digest, Vol. I, No. 2, p. 354.

(No new decisions.)

G. Empty Cars.

See also section F, Federal Ry. Digest, Vol. I, No. 2, p. 354.

(No new decisions.)

H. Cars Moving Interstate Traffic.

See also section B, Federal Ry. Digest, Vol. I, No. 4, p. 83.

(No new decisions.)

I. Cars Used For Both Interstate and Intrastate Traffic.

See also section G, Federal Ry. Digest, Vol. I, No. 2, p. 355.

(No new decisions.)

J. Street and Interurban Cars.

See section D, Federal Ry. Digest, Vol. I, No. 4, p. 81.
See also supra IV, B.

K. Work Trains.

See also section D, Federal Ry. Digest, Vol. I, No. 4, p. 85.

(No new decisions.)

VII. WHAT MOVEMENTS OF CARS WITHIN ACT.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 355-356, No. 3, p. 162, No. 4, pp. 82-87, and Vol. II, pp. 181, 182.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 2, pp. 352-357, No. 3, pp. 162-163, and No. 4, pp. 82-87.

(No new decisions.)

B. Switching and Making Up Trains.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 355, No. 3, p. 163, No. 4, p. 84, and Vol. II, p. 181.

(No new decisions.)

C. Moving Cars for Repairs.

See also same section Federal Ry. Digest. Vol. I, No. 2, p. 356, No. 4, p. 85, and Vol. II, p. 181.

In General.

A carrier must bring itself strictly within the terms thereof in order to invoke the proviso of the Safety Appliance Act respecting the hauling of cars with defective safety appliances to the nearest available repair point. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

The proviso of the Safety Appliance Act with respect to the movement of defective cars after the discovery of defective safety devices to the nearest available repair point for repairs, does not apply if repairs can be made at the place where the defects are discovered. Denver & Rio Grande R. Co. v. United States, — C. C. A. —, 249 Fed. 822.

Undiscovered Defects.

The proviso of the Safety Appliance Act with respect to the hauling of defective cars to the nearest available repair point does not apply to cars which are hauled to such a repair point before their defective safety devices are discovered. Chesapeake & Ohio R. Co. v. United States, — C. C. A. —, 249 Fed. 805, affirming 242 Fed. 161, certiorari denied 248 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 7.

Moving in Separate Trains. — Delivering Freight Enroute.

The moving of crippled cars in a train by themselves to a repair point constitutes a violation of the Safety Appliance Act where the loads of some of the cars are delivered at destination while en route. Denver & Rio Grande R. Co. v. United States, — C. C. A. —, 249 Fed. 822.

Moving Cars for Unloading.

The proviso of the Safety Appliance Act with respect to the hauling of defective cars to the nearest available repair point does not permit the movement of a defective car for the purpose of unloading unless it affirmatively appears that it involves no more movement or handling than would be necessary to unload or transfer the cargo at the place where the defect was discovered. Denver & Rio

Grande R. Co. v. United States, — C. C. A. —, 249 Fed. 822.

Hauling Past Nearest Repair Point.

The hauling of cars having defective safety devices past the nearest available repair point to a more distant one violates the Safety Appliance Act, when no special reason for doing so is shown. Denver & Rio Grande R. Co. v. United States, — C. C. A. —, 249 Fed. 822.

The custom of a carrier to move for repairs main line and foreign cars having defective safety devices past the nearest available repair points to the principal repair shops is not a sufficient reason to excuse the violation of the Safety Appliance Act. Denver & Rio Grande R. Co. v. United States, — C. C. A. —, 249 Fed. 822.

VIII. LIABILITY FOR PERSONAL INJURIES.

See generally section VII, Federal Ry. Digest, Vol. I, No. 2, pp. 357-374, No. 3, pp. 162-164, No. 4, p. 87, and Vol. II, pp. 182-186.

A. In General.

See also section VII, Federal Ry. Digest, Vol. I, No. 2, p. 357, No. 3, p. 163, section VIII, No. 4, p. 87, and Vol. II, p. 182.

Right of Action.

Though the Federal Safety Appliance Act contains no express language conferring a right of action for the death or injury of an employee occasioned by a failure to comply with its requirements, a right of action is within the contemplation and intendment of the Act. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. W. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

Indirect Injuries.

Although the immediate occasion for passing laws requiring grabirons was undoubtedly "for greater security to men in coupling and uncoupling cars," yet these laws are not confined to the protection of employees only when so engaged; and carriers are liable to employees in damages whenever the failure to obey the Safety Appliance Acts is the proximate cause of an injury to them when engaged in the discharge of their duties. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

Negligence as Foundation of Liability.

In an action based on the Safety Appliance Act if the equipment causing injury to an employee was in fact defective or out of repair, the question whether its condition was attributable to the negligence of the defendant is immaterial. Callicotto v. Chicago, Rock Island & Pac. R. Co., — Mo. —, 204 S. W. 528.

The plaintiff's allegation of the defendant's negligence in an action based on the violation of the Safety Appliance Act for personal injuries is surplussage, and the failure of the former to show such negligence does not entitle the defendant to judgment. Callicotto v. Chicago, Rock Island & Pac. R. Co., — Mo. —, 204 S. W. 528.

B. Injuries Due to Defective Coupling Apparatus.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 359, No. 3, p. 163, and Vol. II, p. 183.

In General.

A railway company is liable for injuries proximately caused a switchman by a coupling device which failed to measure up to the standard set by the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

The Safety Appliance Act does not make a carrier absolutely liable for any defect in coupling apparatus which may result in injury to an employee by reason of a coupler not holding, irrespective of whether it couples automatically and can be uncoupled without men going between the ends of cars. Buschalewski v. New York Central R. Co., 173 N. Y. Supp. 506.

Injuries Proximate Result of Defective Coupler Sustained by One Not Using Same.

A railway company is liable under the Safety Appliance Act for the death of a brakeman when due to the absence of a coupler on a car which was struck by the car on which the decedent was riding, although a coupling with the crippled car was not intended to be made or the cars brought into actual contact. Lang v. New York Cent. R. Co., 172 N. Y. Supp. 196.

Employee Not Engaged in Interstate Commerce.

A brakeman employed on an interstate railway may recover for injuries received in consequence of the failure of couplers to work automatically, notwithstanding that he himself was not engaged in interstate commerce at the time of the accident. Devine v. Buffalo, Rochester & Pittsburgh R. Co., — C. C. A. —, 253 Fed. 948.

Intrastate Cars.

The fact that the defective coupler which caused injury to a brakeman was on a car which was being used wholly within a state, will not prevent a recovery for re-

sulting injuries, when the car was in use on an interstate railway at the time of the injury. Texas & Pac. R. Co. v. Sprole, — Tex. Civ. App. —, 202 S. W. 985.

Moving Empty Cars.

The liability of an interstate railway under the Federal Safety Appliance Act, to an employee injured through a violation of the command of that act that certain safety appliances be installed upon railway cars used upon a highway of interstate commerce, exists, although when injured the employee was engaged in returning a defective car to the owner for repairs. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

Moving Car on Private Track.

A carrier is answerable for injuries received by a servant in consequence of a defective coupler while moving a car on a spur track used exclusively for transporting freight to and from a private manufacturing plant. Texas & Pac. R. Co. v. Sprole, — Tex. Civ. App. —, 202 S. W. 985.

Defective Draft Timbers.

A carrier is not liable under the Safety Appliance Act for injuries caused a servant by the giving way of a coupler in consequence of the defective condition of timbers beneath a car which help to sustain the coupler and drawhead to the car, where the automatic features prescribed by such law are all present in the coupler itself so that it works properly and automatically meeting all requirements of the law with respect to automatic coupling. Buschalewski v. New York Central R. Co., 173 N. Y. Supp. 506.

The amendment made to the Safety Appliance Act April 10, 1910, permitting the movement of defective cars for repairs "at the sole risk of the carrier," and holding the latter liable for all resulting injury to employees, does not make a carrier answerable for injuries to a servant by the giving way of a coupler because of the defective condition of timbers beneath a car which hold the coupler and drawhead to the car. Buschalewski v. New York Central R. Co., 173 N. Y. Supp. 506.

Failure of Knuckle to Open.

The failure of a carrier to equip cars with couplers having knuckles which will at all times remain open so as to couple by impact, is not negligence rendering the carrier liable for the death of a brakeman by the movement of cars while he was opening the knuckles with his hands, where he could have done so in safety by using the lever from the side of the car. Chesapeake & Ohio R. Co. v. Charlton, — C. C. A. —, 247 Fed. 34.

Necessity for Lateral Adjustment After Uncoupling on Curve.

The failure of a coupler to couple by impact to a car standing on a straight track, without lateral adjustment after being uncoupled from a car standing on a curve, shows a violation of the Safety Appliance Act in an action for the death of a brakeman while straightening such coupler. Chicago, Rock Island & Pac. R. Co. v. Ray, — Okla. —, 168 Pac. 999, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

Failure of Inspector to Discover Defects.

The failure of a car inspector to discover a defective drawbar is a neglect of duty to the master rather than to a repairman who was injured by the falling of such device while working about the car, and therefore, the master is not liable under the Federal Employers' Liability Act for the injury. Sims v. Minneapolis, St. Paul & S. S. M. R. Co., — Mich. —, 162 N. W. 988.

C. Defective Grabirons, Handholds, Ladders and Running Boards.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 362, No. 3, p. 163, and Vol. II, p. 184.

Defective Sill Step.

A carrier is liable for injuries received by a brakeman from the failure of the former to maintain a secure sill step on a car as required by the Safety Appliance Act. Ewing v. Coal & Coke R. Co., — W. Va. —, 96 S. E. 73, certiorari denied 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

Ladders.

An employee may recover for injuries received in consequence of defective or insecure rungs in the side ladder of a car, which is within the terms of the Safety Appliance Act. Kansas City, Mexico & Orient R. Co. v. Swift, — Tex. Civ. App. —, 204 S. W. 135.

A judgment for the plaintiff sustained under the Safety Appliance Act for the death of a switchman as the result of a fall caused by a defective rung in the ladder of a car. Sullivan v. Minneapolis, St. Paul & S. S. M. R. Co., — Wis. —, 167 N. W. 311.

Failure to Warn of Absence of Grab Irons.

The failure of a carrier to warn an inexperienced brakeman that some cars had grab irons on all four corners, while others had them on two opposite corners only, is not actionable negligence where such fact

was open to observation. Boehmer v. Pennsylvania R. Co., — C. C. A. —, 252 Fed. 553.

D. Absence of or Defects in Power or Hand Brakes.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 363, No. 3, p. 163, and Vol. II, p. 185.

(No new decisions.)

E. Drawbars of Unequal Height.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 364, and Vol. II, p. 185.

(No new decisions.)

F. Going Between Cars.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 364, No. 3, p. 163.

Going Between Cars to Adjust Couplers.

A violation of the Safety Appliance Act is shown in an action for injuries received by a brakeman while between cars trying to adjust the couplers with his hands, by testimony that the knuckle of the coupler failed to open after repeated efforts to open it by pulling and jerking the lever from the side of the car, and that he was also unable to open it with his hands. Texas & Pac. R. Co. v. Sprole, — Tex. Civ. App. —, 202 S. W. 985.

There cannot be a recovery for the death of a brakeman who was killed by the movement of cars as he was opening the knuckle of a coupler with his hands, where, on the failure of cars to couple by impact because of the knuckles were closed, he could have opened them in safety from the side of the car by using the lever. Chesapeake & Ohio R. Co. v. Charlton, — C. C. A. —, 247 Fed. 34.

G. Assumed Risk.

See also same section Federal Ry. Digest, Vol, I. No. 2, p. 366, No. 3, p. 164, No. 4, p. 87, and Vol. II, p. 185.

Violation of Safety Appliance Act.

When the violation by a carrier of the terms of the Safety Appliance Act causes or contributes to the injury or death of an employee, by the express terms of section 4 of the Federal Employers' Liability Act the defense of assumption of risk is abolished. Chicago, Rock Island & Golf R. Co. v. DeBord, — Tex. —, 192 S. W. 767. Reversing — Tex. Civ. App. —, 146 S. W. 667, certiorari denied 245 U. S. 652, 62 L. ed. —, 38 Sup. Ct. Rep. 12.

Assumed risk is not a defense to an action for the death of a brakeman who was killed while between cars adjusting a defective coupler which did not comply with the Safety Appliance Act. Chicago, Rock Island & Pac. R. Co. v. Ray, — Okla. —, 168 Pac. 999, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

A switchman does not assume the risk of injury from coupling apparatus which is not in the condition prescribed by the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

H. Contributory Negligence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 369-374, No. 3, p. 164, and Vol. II, p. 186.

1. In General

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 369, and No. 2, p. 164.

As Defense.

Contributory negligence is no defense to an action for injuries caused a servant in consequence of a carrier's failure to comply with the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

Contributory negligence is not a defense to an action for personal injuries when based on a violation of the Safety Appliance Act. Callicotto v. Chicago, Rock Island & Pac. R. Co., — Mo. —, 204 S. W. 528.

Contributory negligence cannot be considered in mitigation of damages in an action for personal injuries when based on a violation of the Safety Appliance Act. Callicotto v. Chicago, Rock Island & Pac. R. Co., — Mo. —, 204 S. W. 528.

IX. ACTIONS FOR PERSONAL INJURIES.

See generally section VIII, Federal Ry. Digest, Vol. I, No. 2, pp. 374-391, No. 3, pp. 164-166, and Vol. II, pp. 186-188.

Orders of Director General of Railroads respecting venue of actions. See Government Operation of Railways.

A. In General.

See also same section Federal Ry. Digest, Vol I, No. 2, p. 374, and No. 3, p. 165.

Venue.

An action for injuries received in one state by a servant of an interstate railway in consequence of a defective coupling ap-

paratus will lie in another state without reference to the law of the former state, since the action is governed by the Federal Safety Appliance Act. Texas & Pac. R. Co. v. Sprole, — Tex. Civ. App. —, 202 S. W. 985.

B. Removal.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 374.

(No new decisions.)

C. What Law Controls.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 374.

Application of State Workmen's Compencation Acts to employees of interstate carriers, see generally Federal Employers' Liability Act, XVI, D, 2, (g).

State Workmen's Compensation Act.

A state Workmen's Compensation Act does not apply to injuries received by a switchman in the employ of an intrastate carrier, which handles both interstate and intrastate traffic, in consequence of a coupling device which did not comply with the requirements of the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

The fact that a carrier and a switchman entered into an agreement under the terms of a state Workmen's Compensation Act does not permit that act to control an action for injuries caused by a coupling device which did not conform to the Federal Safety Appliance Act, although the latter act does not in terms confer a right of action for such an injury. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

A state Workmen's Compensation Act does not apply to injuries received by a railway employee in consequence of safety devices on a car which do not comply with the Federal Safety Appliance Act. Kenna v. Calumet, Hammond & S. E. R. Co., — Ill. —, 120 N. E. 259, affirming 206 Ill. App. 17.

Since the Safety Appliance Act does not expressly confer a right of action for injuries sustained by employees in consequence of a carrier's violation of such Act, the remedy being under the common law, the right to recover for such injuries is exclusively under a state Workmen's Compensation Act which abolishes the common law relating to the liability of master and servant and substitutes a statutory liability therefor. Ward v. Erie R. Co., — App. Div. —, 172 N. Y. Supp. 691.

D. Limitations.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 375.

(No new decisions.)

E. Pleading.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 375, No. 3, p. 165, and Vol. II, p. 186.

(No new decisions.)

F. Evidence.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 376-380, No. 3, p. 165, and Vol. II, p. 186.

4. Admissibility.

See also same title, Federal Ry. Digest, Vol. I, No. 2, p. 90.

Switching Orders, Train Reports, Etc.

A train report, switching order and transfer bill held admissible in an employee's action for injuries caused by defective safety appliances, in order to show an interstate movement of cars. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

G. Examination of Witnesses.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 380.

(No new decisions.)

H. Issues and Variance.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 380.

(No new decisions.)

I. Questions of Law and Fact.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 380, No. 3, p. 166, and Vol. II, p. 187.

Negligence.

In an action under the Federal Employer's Liability Act for the death of a brakeman the question of the primary negligence of the defendant is for the jury, where the decedent was killed while adjusting a coupler which, after being uncoupled from a car on a curved track, would not, without straightening, couple automatically by impact with a car standing on a straight track. Chicago, Rock Island & Pacific R. Co. v. Ray, — Okla.

—, 168 Pac. 999, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

J. Instructions.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 380, and Vol. II, p. 187.

In General.

In an action for injuries sustained by a railway employee from defective safety devices an instruction reciting in substance sections 1 and 3 of the Federal Employers' Liability Act, and section 4 to the effect that the plaintiff did not assume the risk of injury from the defendant's violation of such act, held not misleading because not explained or limited to the negligence alleged. Kenna v. Calumet, Hammond & S. E. R. Co., — Ill. —, 120 N. E. 259, affirming 206 Ill. App. 17.

In an action for injuries received by a railway employee from defective safety devices an instruction stating the effect of section 2 of the Safety Appliance Act requiring cars to be equipped with automatic couplers, and that an employee injured by the use of locomotives, cars or trains in violation of that act, did not assume the risk of injury, held not misleading because not limited to the negligence alleged. Kenna v. Calumet, Hammond & S. E. R. Co., — Ill. —, 120 N. E. 259, affirming 206 Ill. App. 17.

In an action for injuries to a railway employee in consequence of defective safety devices on a car, an instruction reciting in substance sections 1 and 3 of the Federal Employers' Liability Act, and section 4 thereof to the effect that the plaintiff did not assume the risk of injury from the defendant's nonobservance of the terms of such act, held not to imply that the plaintiff did not assume the risk of injury from the negligence of fellow servants, where other instructions stated the correct rule. Kenna v. Calumet, Hammond & S. E. R. Co., — Ill. —, 120 N. E. 259, affirming 206 Ill. App. 17.

Measure of Damages.

In an action based on the Safety Appliance Act for the benefit of a mother for the death of a son, whom the evidence showed often contributed to her support, gave her money whenever she needed it, and who stated that he intended to take care of her, the jury was properly instructed that in determining the measure of damages, "you may take into consideration the pecuniary value of the son's services until he reached the age of 21 years; what sum if any of such services would have been received by plaintiff, and if you believe from the evidence that plaintiff had a reasonable expectation of receiving from her son, had he lived, contributions to her and her husband's wants and necessities after he reached his majority, such sum as in your judgment would have been received out of the earnings of her son by her and her husband after arriving at such majority." Chicago, Rock Island & Pac. R. Co. v. Ray, — Okla. —, 168 Pac. 999, certiorari denied 246 U. S. —, 62 L. ed. —, 38 Sup. Ct. Rep. 333.

State Workmen's Compensation Act.

Since the Federal Safety Appliance Act may control an employee's action for personal injuries although neither he nor his employer were actually engaged in interstate commerce at the time of the accident, an instruction that a state Workmen's Compensation Act applied if the parties were not so engaged, was properly refused. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

K. Arguments.

See also same section Federal Ry. Digest. Vol. I, No. 2, p. 387.

(No new decisions.)

L. Verdict.

See generally same section Federal Ry. Digest, Vol. I, No. 2, p. 387-389, and No. 3, p. 166.

3. Amount.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 389.

For Personal Injuries.

A verdict for $10,000 is not excessive in an action under the Safety Appliance Act for the loss of the left hand of a switchman 51 years of age, who earned $100 monthly, where he lost $3,000 in time, was unable to obtain further employment and also suffered great pain. Kenna v. Calumet, Hammond & S. E. R. Co., 206 Ill. App. 17, affirmed 284 Ill. 301, 120 N. E. 259.

M. New Trial.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 389.

(No new decisions.)

N. Appeal and Error.

See generally same section Federal Ry. Digest, Vol. I, No. 2, pp. 389-391, and No. 3, p. 166.

(No new decisions.)

X. ACTIONS FOR PENALTIES.

See generally same section Federal Ry. Digest, Vol. I, No. 4, pp. 87-92, and Vol. II, p. 188.

Actions for violation of act during Federal control, see title Government Operation of Railways.

A. In General.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 87.

(No new decisions.)

B. Nature of Action.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 88.

(No new decisions.)

C. Pleadings.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 88.

(No new decisions.)

D. Evidence.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 89, and Vol. II, p. 188.

E. Examination of Witnesses.

See also same section Federal Ry. Digest, Vol. I, No. 2, p. 91.

(No new decisions.)

F. Questions of Law and Fact.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 91.

(No new decisions.)

G. Instructions.

See also same section Federal Ry. Digest. Vol. I, No. 4, p. 91.

(No new decisions.)

H. Verdict.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 92.

Rendering Judgment on Defendant's Answer.

To allow a recovery by the government for a violation of the Safety Appliance Act based on admissions in the answer of the defendant, although it contains a general denial also, does not deprive the carrier of its property without due process of law. Great Northern R. Co. v. United States, — C. C. A. —, 244 Fed. 406, S. C. 144, C. C. A. 209, 229 Fed. 927, certiorari denied 245 U. S. 665, 62 L. ed. —, 38 Sup. Ct. Rep. 63.

When the complaint, in an action for the violation of the Safety Appliance Act, alleged that the speed of an interstate freight train was controlled by using the hand brakes instead of the power brakes, a judgment may be rendered for the government on the defendant's answer which, although it contained a general denial of the allegations of the complaint, averred that 85 per cent of the cars in such train were equipped with power brakes which were operated by the engineer in connection with the hand brakes, to control the speed of the train, since the answer in effect admitted and did not deny that the speed of the train was controlled by the hand brakes, rather than seeking to avoid liability by pleading the use of the dual means of control. Great Northern R. Co. v. United States, — C. C. A. —, 244 Fed. 406, S. C. 144 C. C. A. 209, 229 Fed. 927, certiorari denied 245 U. S. 665, 62 L. ed. —, 38 Sup. Ct. Rep. 63.

I. Appeal and Error.

See also same section Federal Ry. Digest, Vol. I, No. 4, p. 92.

(No new decisions.)